(1)

Supreme Court, U.S.
FILED

041057 FEB 2 - 2005

OFFICE OF THE CLERK

No. 04-

IN THE

Supreme Court of the United States

LORRAINE "JADE" MCKENZIE,

Petitioner,

v.

MARK BENTON, IN HIS OFFICIAL CAPACITY AS SHERIFF OF NATRONA COUNTY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Bernard Q. Phelan
PHELAN-WATSON
LAW OFFICES
2206 Pioneer Avenue
Cheyenne, WY 82001
(307) 634-8085

Robert A. Long
Counsel of Record
Theodore P. Metzler
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Petitioners

QUESTION PRESENTED

Whether the Tenth Circuit correctly held, in conflict with five other circuits, that the burden of proving whether a plaintiff in an Americans with Disabilities Act case is a "direct threat" to others lies with the plaintiff when there is a "special risk" associated with the job in question.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 8

I. There Is An Acknowledged Circuit Split Over Which Party In An ADA Case Bears The Burden Of Proving A "Direct Threat." 8

A. The Eleventh Circuit Requires An ADA Plaintiff To Prove That She Is Not A "Direct Threat." 9

B. The Burden Of Proof In The First And Tenth Circuits Depends On The Nature Of The Employment. 9

C. The Second, Fifth, Seventh, And Ninth Circuits Require The Defendant To Prove The "Direct Threat" Affirmative Defense To Discrimination Under The ADA. 11

II. The Question Presented Is Important And Recurring. 15

III. Further "Percolation" In The Courts Of Appeals Will Not Develop This Issue Further. 16

IV. The Burden Of Proof Of "Direct Threat" In An ADA Case Is Properly Borne By The Defense. 17

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Page(s)

Albertson's, Inc. v. *Kirkingburg*,
527 U.S. 555 (1999) 12-13
Belk v. Southwestern Bell Tel. Co.,
194 F.3d 946 (8th Cir. 1999) 15
Board of Trs. of the Univ. of Ala. v. Garrett,
531 U.S. 356 (2001) 8
Borgialli v. *Thunder Basin Coal Co.*,
235 F.3d 1284 (10th Cir. 2000) 6
Bragdon v. *Abbott*,
524 U.S. 624 (1998) 18
Branham v. *Snow*,
No. 03-3599, 2004 U.S. App. LEXIS
26262 (7th Cir. Dec. 17, 2004) 8-9, 14-15, 16, 20
Chevron U.S.A. Inc. v. Echazabal,
536 U.S. 73 (2002) 8, 9, 17
Dadian v. *Vill. of Wilmette*,
269 F.3d 831 (7th Cir. 2001) 15
EEOC v. Amego, Inc.,
110 F.3d 135 (1st Cir. 1997) 7, 10-11, 16, 19
EEOC v. Waffle House, Inc.,
534 U.S. 279 (2002) 8
Hargave v. *Vermont*,
340 F.3d 27 (2d Cir. 2003) 12
Hutton v. *Elf Atochem N. Am.*,
273 F.3d 884 (9th Cir. 2001) 8, 12
L. E. Waterman Co. v. Modern Pen Co.,
235 U.S. 88 (1914) 17
Lovejoy-Wilson v. *NOCO Motor Fuel, Inc.*,
263 F.3d 208 (2d Cir. 2001) 12-13
Moses v. *American Nonwovens, Inc.*,
97 F.3d 446 (11th Cir. 1996) 9

Nunes v. *Wal-Mart Stores, Inc.*,
164 F.3d 1243 (9th Cir. 1999) 11-12
Raytheon Co. v. Hernandez,
540 U.S. 44 (2003) 2
Rizzo v. Children's World Learning Center, Inc.,
84 F.3d 758 (5th Cir. 1996) ("*Rizzo I*") 13
Rizzo v. *Children's World Learning Centers, Inc.*,
173 F.3d 254 (9th Cir. 1999) ("*Rizzo II*") 13-14
Rizzo v. Children's World Learning Centers, Inc.,
213 F.3d 209 (5th Cir. 2000) ("*Rizzo III*") 7, 8, 9, 14
School Bd. of Nassau County v. Arline,
480 U.S. 273 (1987) 10, 12
Stafne v. *Unicare Homes*,
266 F.3d 771 (8th Cir. 2001) 15, 19
Sutton v. United Air Lines,
527 U.S. 471 (1999) 8
Waddell v. *Valley Forge Dental Assocs.*,
276 F.3d 1275 (11th Cir. 2001) 9, 17

STATUTES

28 U.S.C. § 1254 1
42 U.S.C. § 12101 2
42 U.S.C. § 12102 3
42 U.S.C. § 12111 3
42 U.S.C. § 12112 ..... 2, 4
42 U.S.C. § 12113 ..... 3, 17

REGULATIONS

29 C.F.R. §1630.2(r) 12, 18
29 C.F.R. 1630 App. 19

MISCELLANEOUS

H.R. Rep. No. 101-485, pt. 3 (1990), reprinted in
1990 U.S.C.C.A.N. 445 ..... 10, 12, 19-20

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case that Petitioner bore the burden of proving that not only that her employer discriminated against her because of her disability, but also that she did not pose a "direct threat" to the safety of others.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a, is reported at 388 F.3d 1342. The district court case entered judgment on the jury verdict, App., *infra*, 22a, without opinion. A prior opinion of the court of appeals in this case, App., *infra*, 23a is reported at 242 F.3d 967.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2004. App., *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Sections 3, 101, 102, and 103 of the Americans with Disabilities Act, 42 U.S.C. §§ 12102, 12111, 12112, and 12113, and accompanying regulations, 29 C.F.R. § 1630.2(r), and interpretive guidance, 29 C.F.R. § 1630 App., are reprinted in the Appendix. *See* App., *infra*, 41a-48a.

STATEMENT OF THE CASE

This case presents an important and recurring question arising under the Americans with Disabilities Act ("ADA" or "Act"), 42 U.S.C. §§ 12101-12213, on which the federal courts of appeals have split three ways: Which party has the burden of proof when an employer alleges that an individual was denied employment because she posed a "direct threat"

to others that could not be overcome by a reasonable accommodation?

The jury in this case determined that Petitioner Jade McKenzie was a qualified individual with a disability within the meaning of the ADA when she sought reemployment with Respondent Sheriff Mark Benton. The jury further determined that Benton discriminated against McKenzie because of her disability. The trial court instructed the jury, over McKenzie's objections, that McKenzie "must prove, by a preponderance of the evidence, that she did not pose a direct threat to herself or others." The jury found that McKenzie failed to prove that she did not pose a direct threat, and judgment was entered for Sheriff Benton.

1. The ADA's Prohibition of Discrimination. The ADA was enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1), and "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4).

Title I of the Act prohibits employers from discriminating in hiring decisions against a qualified individual with disability because of the individual's disability. 42 U.S.C. § 12112(a); *Raytheon Co.* v. *Hernandez*, 540 U.S. 44, 46 (2003). The statute defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities" of the individual, "a record of such an impairment," or "being

regarded" by the employer "as having such an impairment." 42 U.S.C. § 12102 (2).[1]

2. Affirmative Defense. Section 103 of the Act provides an affirmative defense to discrimination, where the employee poses a "direct threat" to the health or safety of others. 42 U.S.C. § 12113(b). Specifically, Section 103 provides:

> (a) In general
>
> It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.
>
> (b) Qualification standards
>
> The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

42 U.S.C. § 12113. "Direct threat," in turn, is defined in Section 101 as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3). The "direct threat" defense is thus available to an employer that has

---

[1] McKenzie contended at trial that she was disabled within the meaning of the ADA because Benton regarded her as disabled, or because she had a record of disability.

discriminated against an individual in violation of 42 U.S.C. § 12112(a), if the following conditions are met:

1. The discrimination was the result of employing a qualification standard;

2. The qualification standard required that the individual not pose a significant risk to the health or safety of others in the workplace;

3. Because of the individual's disability, he or she did pose such a risk; and

4. The risk could not be eliminated with a reasonable accommodation.

The question presented here is which party has the burden of proving whether the plaintiff posed a significant risk because of her disability.

3. The Facts of This Case. Jade McKenzie worked for ten years as a deputy sheriff in the Natrona County Sheriff's office without a negative performance evaluation. App. *infra*, 2a-3a. During her tenure, McKenzie was promoted twice, first to corporal and later to sergeant. *Id.* With her second promotion, McKenzie was assigned duties as a shift supervisor within the department. *Id.* at 23a.

In her tenth year with the sheriff's office, McKenzie sought marriage counseling. R. 2:117-18. Through therapy, McKenzie discovered that the problem stemmed from sexual abuse by her father during McKenzie's childhood. R. 2:118-119. As McKenzie continued treatment with a psychologist, she developed symptoms of post-traumatic stress and other disorders. App., *infra*, 3a. McKenzie's treatment included medication, therapy, and intermittent hospitalization. The treatment also required that McKenzie take significant time off from work. *Id.* McKenzie's therapist, Darlene Bayuk, testified that it was essential to her treatment that McKenzie

release her anger at her father. R. 3:382-3. Bayuk testified that she recommends that patients who have been victims perform physical acts to express this anger such as throwing darts at a photograph or similar measures. R. 3:398. McKenzie went to her father's gravesite, where she knew it was not illegal to discharge a firearm, and fired her personal revolver into her father's grave. App., *infra*, 3a; *see also id.*, 36a & n.7 (noting the sheriff's admission that firing the gun was not illegal). Thereafter, McKenzie voluntarily resigned her position while she sought additional treatment. *Id.* at 3a.

After she completed treatment and her psychologist certified that she was fit to return to work, McKenzie sought reemployment with then-sheriff Dovala.[2] *Id.* at 3a. Dovala told McKenzie that her application would be considered for future openings with the department. *Id.* Sheriff Dovala admitted, however, that when openings subsequently arose he discussed the possibility of hiring McKenzie with his staff and decided that she would not be considered because of her prior psychological problems. *Id.* at 4a-5a, 29a-30a. A year later, McKenzie met with Dovala and asked to be considered for a position as a deputy sheriff or any other position within the department. *Id.* at 4a-5a, 24a. The sheriff told her that he would not consider her application because of her prior mental instability, even if she passed a psychological examination. *Id.* As the court of appeals put it, "Sheriff Dovala said that members of his staff told him that 'based upon what they knew about what had happened in the previous year,' McKenzie 'would be better off in some other field.'" *Id.* at 4a.

---

[2] At the time of the events in this case, the sheriff of Natrona Country was David Dovala. Respondent Mark Benton subsequently replaced Dovala as sheriff. App., *infra*, 5a n.1.

4. Procedural History. McKenzie brought this action in the District Court for the District of Wyoming. She alleged that the sheriff of Natrona County, Wyoming, discriminated against her in violation of the ADA when he refused to rehire her because of her prior mental disability. The district court (Downes, C.J.) initially granted summary judgment in favor of the sheriff, finding that McKenzie could not show that she was she disabled under the ADA. The Tenth Circuit reversed, concluding that McKenzie had made out a prima facie case of discrimination under the ADA. App., *infra*, 23a-40a.

On remand, the case was tried to a jury, which found that McKenzie was disabled within the meaning of the ADA, that she was otherwise qualified for the position of deputy sheriff, and that the sheriff had discriminated against her because of her disability. App., *infra*, 2a. The district court, however, instructed the jury that McKenzie bore the burden of proving not only these elements of an ADA discrimination claim, but also bore the burden of proving that she did not pose a "'direct threat' to the health and safety of herself and her co-workers." App., *infra*, 21a. The jury found that she had not carried this burden. *Id.* at 2a.

5. The Court of Appeals' Opinion. McKenzie appealed the district court's judgment, arguing, *inter alia*, that the trial court erred in instructing the jury that she bore the burden of proving that she did not pose a direct threat to herself or others. App., *infra*, 7a. The Tenth Circuit affirmed.

The court reviewed its prior cases dealing with claims that an employee was a "direct threat," noting that in *Borgialli* v. *Thunder Basin Coal Co.*, 235 F.3d 1284 (10th Cir. 2000), it "discussed the split among the federal appellate courts regarding which party bears the burden of proof on the presence or lack of a 'direct threat.'" App., *infra*, 18a. After reviewing decisions of the First, Fifth, and Eleventh Circuits,

the court concluded that the burden of proving direct threat falls on an ADA plaintiff in some circumstances. *Id.* The court cited *Borgialli* and *Rizzo* v. *Children's World Learning Centers, Inc.*, 213 F.3d 209, 213 n.4 (5th Cir. 2000) (en banc) ("*Rizzo III*"), for the proposition that "the burden may fall on the employer, but with an exception: where the essential job duties necessarily implicate the safety of others, then the burden may be on the plaintiff to show that she can perform those functions without endangering others." *Id.* (marks and alterations omitted).[3] The court also quoted the First Circuit's holding in *EEOC* v. *Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997), that "[w]here those essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others." *Id.* The court noted the conflicting holdings of the Second and Ninth Circuits that defendant bears the burden of proving the affirmative defense that plaintiff is a "direct threat." *Id.* at 19a n.5.

The court went on to hold that because there was "a special risk to others, co-workers and the public, who are exposed to the danger of a firearm in the control of McKenzie . . . it was not error for the trial judge to instruct the jury that McKenzie bore the burden of proof on not being a direct threat." *Id.* at 19a.

---

[3] The quoted language from *Rizzo III* describes a party's argument rather than the court's view. *See Rizzo III*, 213 F.3d at 213 n.4. The Fifth Circuit's position on the burden of proof of the direct threat defense is discussed *infra*, part I.B.

REASONS FOR GRANTING THE WRIT

I. There Is An Acknowledged Circuit Split Over Which Party In An ADA Case Bears The Burden Of Proving A "Direct Threat."

The Tenth Circuit's opinion in this case correctly recognizes the existence of a split among the federal courts of appeals over which party bears the burden of proving whether an employee poses a direct threat to the safety of others. App. *infra*, 19a. The opinion recognizes three positions taken by the courts of appeals: The minority view, adopted by a single circuit, is that plaintiff always bears the burden. Two circuits hold that defendant bears the burden unless the essential functions implicate the safety of others or the job entails special risk. And the majority view, adopted by four circuits, is that defendant bears the burden of proving "direct threat." Other courts have also noted this split. *E.g.*, *Hutton* v. *Elf Atochem N. Am.*, 273 F.3d 884, 893 n.5 (9th Cir. 2001) (collecting cases); *Rizzo III*, 213 F.3d at 213.

The circuit split warrants review by this Court.[4] Indeed, as explained below, the disagreement among the circuits is even more pronounced than would appear from the Tenth Circuit's opinion. In addition to the Tenth Circuit and the five other circuits cited in its opinion, the Seventh Circuit has recently reaffirmed its prior holding that "it is the employer's burden to show that an employee posed a direct threat to workplace safety that could not be eliminated by a reasonable accommodation." *Branham* v. *Snow*, No. 03-3599, 2004 U.S. App. LEXIS 26262 (7th Cir. Dec. 17, 2004) (marks and

---

[4] The Court regularly grants review in ADA cases to resolve issues on which the courts of appeals are divided. *See, e.g.*, *Chevron U.S.A. Inc.* v. *Echazabal*, 536 U.S. 73 (2002); *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002); *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001); *Sutton* v. *United Air Lines*, 527 U.S. 471 (1999).

citation omitted). Moreover, the Tenth Circuit incorrectly implied that the Fifth Circuit's opinion in *Rizzo III* comported with its own opinion and that of the First Circuit. As explained below, the Fifth Circuit places the burden on defendant in all circumstances where "direct threat" would constitute a defense to discrimination.

A. The Eleventh Circuit Requires An ADA Plaintiff To Prove That She Is Not A "Direct Threat."

The Eleventh Circuit stands alone in employing a categorical approach that places the burden of proving the absence of "direct threat" on plaintiffs. In *Moses* v. *American Nonwovens, Inc.*, the court stated, "The employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available." 97 F.3d 446, 447 (11th Cir. 1996). The court has not deviated from *Moses* since it was decided. *E.g.*, *Waddell* v. *Valley Forge Dental Assocs.*, 276 F.3d 1275, 1280 (11th Cir. 2001). In *Waddell*, the court explained its view that if a plaintiff cannot prove the absence of direct threat, "he is not a qualified individual and therefore cannot establish a prima facie case of discrimination." *Id.*[5]

B. The Burden Of Proof In The First And Tenth Circuits Depends On The Nature Of The Employment.

The First Circuit is the only court of appeals, other than the Tenth Circuit below, to hold that the burden of proof of direct threat depends on the nature of plaintiff's employment.

---

[5] This is not the first ADA case to present a split among the federal circuits implicating *Moses*. In *Echazabal*, the Court noted that the Ninth Circuit opinion below conflicted with *Moses*. 536 U.S. at 78.

In *EEOC* v. *Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997), the court stated:

> We hold that, in a Title I ADA case, it is the plaintiff's burden to show that he or she can perform the essential functions of the job, and is therefore "qualified." Where those essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others.

Id. at 144. The court further opined that "[t]here may be other cases under Title I where the issue of direct threat is not tied to the issue of essential job functions but is purely a matter of defense, on which the defendant would bear the burden." *Id.* The First Circuit reached this conclusion only after concluding that "the statutory scheme does not clearly resolve this debate," and looking to the legislative history of the ADA. *Id.* at 143.

Despite legislative history clearly stating that "if the applicant is otherwise qualified for the job, he or she cannot be disqualified on the basis of a physical or mental condition unless *the employer can demonstrate* that the applicant's disability poses a direct threat to others in the workplace," the court held that the employee may required to show the absence of such risk. *Id.*, quoting H.R. Rep. No. 101-485, pt. 3, at 46 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 469 (emphasis added). The court found that the legislative history of the ADA indicates that the affirmative defense of Section 103 was intended to codify the direct threat standard of this Court's holding in *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987). According to the First Circuit, "*Arline* considered direct threat to be part of the 'qualification' analysis under § 504 [of the Rehabilitation Act] as to which plaintiff bears the burden." 110 F.3d at 143. Although it stated that "unlike the Rehabilitation Act, the

ADA's definition of 'qualified individual' does not address risk posed to others," the court nonetheless found that the legislative history shows that "Congress intended" the two definitions to be "comparable." *Id.* at 144.

While both the First and Tenth Circuits' positions depend on the nature of the plaintiff's employment, the two courts' holdings are not entirely identical. The plaintiff in *Amego* was responsible for distributing prescription drugs to disabled individuals under her care. The court found that this was an "essential function" of the job, and plaintiff could be required to prove that she could perform this function safely in light of her two attempted suicides by overdose. *Id.* In McKenzie's case, however, the court below recognized that the "case does not involve some of the circumstances of *Amego, Inc.*, such as the safety of others where the essential functions involve the care of others unable to care for themselves." App., *infra*, 19a. The court held instead that "there is a special risk to others, co-workers and the public, who are exposed to the danger of a firearm in the control of McKenzie." *Id.*

C. The Second, Fifth, Seventh, And Ninth Circuits Require The Defendant To Prove The "Direct Threat" Affirmative Defense To Discrimination Under The ADA.

Four circuits have held that, because it is an affirmative defense, defendant bears the burden of proving that an employee poses a "direct threat."

The Ninth Circuit addressed the question of burden of proof of "direct threat" in *Nunes* v. *Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999). The court stated, "Because this is an affirmative defense, Wal-Mart bears the burden of proving that Nunes is a direct threat." *Id.* The court went on to explain that courts evaluating a direct threat defense should consider (i) "whether the employer has demonstrated that the employee cannot perform the job

without a significant risk of harm"; and (ii) "whether the employer can make a reasonable accommodation, without undue hardship to the employer, so that the employee can perform her job without such risk." *Id.* at 1248. The court reaffirmed that defendant bears the burden of proving the direct threat defense in *Hutton*, 273 F.3d at 893 & n.5, and noted the growing split among the circuits.

The Second Circuit also has held that defendant bears the burden of proving the direct threat affirmative defense. The court unequivocally stated in *Hargave* v. *Vermont*, 340 F.3d 27 (2d Cir. 2003), that "[i]n the employment context, it is the defendant's burden to establish that a plaintiff poses a 'direct threat' of harm to others." The court cited its prior holding in *Lovejoy-Wilson* v. *NOCO Motor Fuel, Inc.*, 263 F.3d 208, 220 (2d Cir. 2001). In *Lovejoy-Wilson*, the district court had rejected defendant's affirmative defense "that the plaintiff is not a qualified individual because she poses a direct threat to the health or safety of other individuals in the workplace," but had held that she was not a qualified individual with a disability. *Id.* at 219 & n.6 (marks omitted).

The *Lovejoy-Wilson* court conducted a wide examination of the "direct threat" defense, first examining the language of the defense in ADA Section 103 and the definition of "direct threat" in Section 101, then the further definition of "direct threat" contained in EEOC regulations, 29 C.F.R. §1630.2(r). The court cited the ADA's legislative history for the proposition that "'the plaintiff is not required to prove that he or she poses no risk,'" H.R. Rep. No. 101-485, pt. 3, at 46 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 469. 263 F.3d at 220. The court went on to cite this Court's holdings that an individualized assessment of an employee's ability to safely perform the essential functions of his job is required to protect disabled individuals from discrimination based on "prejudice, stereotypes, or unfounded fear." *Id.*, quoting *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 287 (1987), *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 569

(1999). Ultimately, the court held that defendant "has failed to provide any evidence that the plaintiff poses a significant risk of substantial harm." *Lovejoy*, 263 F.3d at 220. The court therefore declined to affirm the district court's holding that plaintiff was not a qualified individual with a disability.

In *Rizzo* v. *Children's World Learning Center, Inc.*, the Fifth Circuit confronted the issue of which party to an ADA suit has the burden of proving direct threat over the course of three separate published opinions. The case involved a teacher's claim that her employer had discriminated against her because of a hearing impairment. The Fifth Circuit initially reversed the district court's grant of summary judgment. 84 F.3d 758, 760 (5th Cir. 1996) ("*Rizzo I*"). On the burden of proof, the court held, "As with all affirmative defenses, the employer bears the burden of proving that the employee is a direct threat." *Id.* at 764.

On remand from *Rizzo I*, the jury held in favor of the plaintiff and awarded damages. On appeal, the court again considered the burden of proof of direct threat. *Rizzo* v. *Children's World Learning Centers, Inc.*, 173 F.3d 254 (5th Cir. 1999) ("*Rizzo II*"). Because the defendant put forth two assignments of error based on the burden of proof, the *Rizzo II* court examined the issue extensively. *Id.* at 258. The court took a nuanced view, starting with the proposition that plaintiff must prove she is a "qualified individual with a disability," and that plaintiff's burden can include proving the absence of a direct threat. *Id.* at 262 & n.13. However, according to the *Rizzo II* court, that burden requires plaintiff to prove compliance with a purported safety requirement only if the requirement does not tend to screen out the disabled. *Id.*[6] Because the purported safety requirement at

---

[6] While the *Rizzo II* court claimed to disagree with the Eleventh Circuit in *Moses*, "only insofar as that opinion allows for no exceptions," the exception the Fifth Circuit articulated – for requirements that tend to (...continued)

issue in *Rizzo* tended to screen out teachers with a hearing disability, the court held that defendant bore the burden of establishing non-compliance with the safety requirement. *Id.* at 259-60 ("We hold that, in accord with the federal regulations, when a court finds that the safety requirements imposed tend to screen out the disabled, then the burden of proof shifts to the employer, to prove that the employee is, in fact, a direct threat.")

The Fifth Circuit granted rehearing en banc. The en banc majority held that the district court did not commit plain error when it instructed the jury that defendant bore the burden of proof of direct threat. *Rizzo III,* 213 F.3d at 209. The *Rizzo III* court concluded that no objection had been made to the jury instruction, and thus reviewed the instruction only for plain error. The *Rizzo II* opinion on the burden of proof, however, addressed not only the defendant's appeal of the jury charge, but also its appeal of the failure to grant judgment as a matter of law. *Rizzo II*, 173 F.3d at 258. Because the latter issue was not before the en banc court, *Rizzo II*'s holding that defendant has the burden of proof of direct threat so long as the purported safety requirement tends to screen out the disabled remains the authoritative precedent of the Fifth Circuit.

Lastly, the Seventh Circuit agrees with the Second, Fifth, and Ninth, that the defendant has the burden of proving the direct threat defense. The court most recently discussed the issue in *Branham* v. *Snow*, No. 03-3599, 2004 U.S. App. LEXIS 26262 (7th Cir. 2004). The court there adhered to its prior holding that "'it is the employer's burden to show that an employee posed a direct threat to workplace safety that could not be eliminated by a reasonable accommodation."

---

screen out the disabled – covers all cases where "direct threat" would be asserted as a defense to discrimination. 173 F.3d at 259-60.

Id. at *24 (quoting *Dadian* v. *Vill. of Wilmette*, 269 F.3d 831, 841 (7th Cir. 2001)). The court then noted the conflicting holdings of the various circuits, including the instant case. *Id.* at *25 n.5. After discussing the possible reason for the split, the court held, "We see no reason to revisit the established law of this circuit in this case. Our earlier decision finds support in the plain wording of the statute and in common sense." *Id.* [7]

II. The Question Presented Is Important And Recurring.

The ADA was intended to ensure that the disabled – and those regarded as disabled by their employer – are provided equal opportunity without regard to stereotypes and prejudices. Although the "direct threat" defense sets a sensible and necessary boundary on the ADA's prohibition of discrimination, it can provide an outcome-determinative opportunity to introduce stereotypes and prejudices at trial when the burden is placed on plaintiff to prove the negative proposition that she does not pose a direct threat to others.

In the instant case, the sheriff admitted that his decision not to rehire McKenzie was based on what he and his staff knew about her past mental problems. At trial, Benton called a Chicago police supervisor who testified as an expert that it was reasonable for a police supervisor to refuse to rehire McKenzie "based solely on his knowledge of [her] mental

---

[7] Although the Eighth Circuit has not directly addressed the question presented, it has held that the employer bears the burden of proving the analogous "business necessity defense" of ADA Section 103(a). *Belk* v. *Southwestern Bell Tel. Co.*, 194 F.3d 946 (8th Cir. 1999). And at least one judge on that court has concluded that the burden of proving direct threat should lie with defendant. *Stafne* v. *Unicare Homes*, 266 F.3d 771, 779 (8th Cir. 2001) (Lay, J., dissenting) ("the employer in posing an affirmative defense must carry the burden of proof that the individual poses a direct threat to the safety of those in the workplace").

health history." App., *infra*, 6a. Further, McKenzie's doctors were asked on cross examination whether there was any way to guarantee or predict whether episodes related to post-traumatic stress disorder might recur. *Id.* at 4a. In such circumstances, where defendant exploits the prejudices and stereotypes associated with mental illness, it is hardly surprising that the jury found that McKenzie had failed to prove that she was not a direct threat.

The numerous cases that form the split here attest that the issue is not only important but also recurring. In the short time since the case below was decided, the Seventh Circuit has had occasion to address the issue again. *Branham*, 2004 U.S. App. LEXIS 26262. Absent this Court's intervention, the outcome of ADA cases will depend not on their merits, but on the circuit in which the plaintiff has the fortune (or misfortune) to reside.

III. Further "Percolation" In The Courts Of Appeals Will Not Develop This Issue Further.

Over the course of nine years, seven circuits have spoken on the question of which party bears the burden of proving the "direct threat" defense in an ADA case. After variously examining the language of the ADA, its implementing regulations, and its legislative history, these courts have come to at least three different conclusions. These conflicting positions are not likely to be reconciled absent review by this Court. As noted above, the Fifth, Seventh, Ninth, and Tenth Circuits have acknowledged the conflicting opinions of other circuits. Several courts of appeals have opined that the plain language of the ADA does not clearly answer the question as to the burden of proof. *E.g.*, *Branham*, 2004 U.S. App. LEXIS 26262, at *25 n.5; *Rizzo III*, 213 F.3d at 213 n.4; *Amego*, 110 F.3d at 143. The arguments have now been fully developed, and the courts of appeals have staked out their positions. The issue is ripe for

a decision of this Court to resolve the conflict and restore uniformity to federal law in this area.

IV. The Burden Of Proof Of "Direct Threat" In An ADA Case Is Properly Borne By The Defense.

The lower court decisions placing the burden of proof of "Direct Threat" on ADA plaintiffs are unpersuasive. These courts mistakenly equate the ADA's use of "qualification standard" as part of the direct threat defense of Section 103 with Section 102's prohibition of discrimination against "qualified individuals." The courts therefore conclude that in order to prove that she is a "qualified individual," plaintiff must also prove the absence of direct threat. *See Waddell*, 276 F.3d at 1280.

The "direct threat" language in the ADA does not appear in the definition of a "qualified individual," but in Section 103, which is entitled "Defenses." 42 U.S.C. § 12113. The plain meaning of Section 103 is thus that the existence of a "direct threat" is an affirmative defense. This Court has characterized Section 103 as creating "an affirmative defense for action under a qualification standard" that "may include 'a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Echazabal*, 536 U.S. at 88. As with other affirmative defenses, the burden of proof is properly placed on the defendant. *E.g.*, *L. E. Waterman Co.* v. *Modern Pen Co.*, 235 U.S. 88 (1914) ("The burden of proof is upon the defendant company to prove the affirmative defense set up by the answer.").

Further, this Court has required that defendants bear the burden of proving "direct threat" in actions under Title III of the ADA. *See Bragdon* v. *Abbott*, 524 U.S. 624, 653 (1998) ("The [defendant] was required to establish that there existed a genuine issue of material fact" regarding the existence of a "direct threat."); *see also id.* at 655 (Stevens, J., concurring) ("I do not believe petitioner has sustained his burden of adducing evidence sufficient to raise a triable issue of fact on the significance of the risk posed . . . ."). While the dissent in *Bragdon* disagreed with the Court's conclusion that the defendant had adduced sufficient evidence on "direct threat," it did not take issue with the burden of proof. *See id.* at 663 (Rehnquist, C.J., dissenting) ("[I]t is clear to me that petitioner has presented more than enough evidence to avoid summary judgment on the 'direct threat' question.").

An inquiry into whether an individual poses a "direct threat" under the ADA must be individualized and based on the best current medical or other objective evidence. *Bragdon*, 524 U.S. at 649 (interpreting "direct threat" provision of Title III of the ADA). The EEOC's regulations applicable to Title I of the ADA have incorporated this Court's standard as articulated in *Bragdon* and *Arline*:

> The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

29 C.F.R. 1630.2(r). The EEOC's interpretive guidance goes further, stating that in determining whether an employee poses a direct threat:

> *The employer* should identify the specific risk posed by the individual. For individuals with mental or emotional disabilities, *the employer* must identify the specific behavior on the part of the individual that would pose the direct threat. For individuals with physical disabilities, *the employer* must identify the aspect of the disability that would pose the direct threat.

29 C.F.R. 1630 App. (emphases added). Because the employer must make this inquiry, the employer should also be required to prove the basis of its decision if the matter winds up in court. The regulations and their interpretive guidelines indicate EEOC's view that the defendant-employer has the burden of proving that the employee posed a direct threat.[8]

Finally, the legislative history supports placing the burden of proving direct threat on defendants. As the *Amego* court recognized, the House Report states that "if the applicant is otherwise qualified for the job, he or she cannot be disqualified on the basis of a physical or mental condition unless *the employer can demonstrate* that the applicant's disability poses a direct threat to others in the workplace." H.R. Rep. No. 101-485, pt. 3, at 46 (1990), reprinted in 1990 U.S.C.C.A.N. at 469 (emphasis added). The Report further states that the amendment defining "direct threat" "sets a clear, defined standard *which requires actual proof of significant risk to others*." *Id.*[9] This language implies that

---

[8] The EEOC has consistently advanced this position in litigation. *See, e.g.*, *Stafne*, 266 F.3d at 779 & n.6 (noting EEOC's amicus brief on the burden of proof issue); *Amego*, 110 F.3d at 137.

[9] An example given in the House Report of how the direct threat defense should be applied highlights the disparity between Congress's intent and the result in this case: "For example, an employer may not (...continued)

the employer, not the employee, has the burden of proving that there is a "significant risk."

As the Seventh Circuit recently stated, placing the burden of proving the direct threat defense on the defendant "finds support in the plain wording of the statute and in common sense." *Branham*, 2004 U.S. App. LEXIS 26262, at *25 n.5. "The [employer] is in the best position to furnish the court with a complete factual assessment of both the . . . qualifications of the candidate and of the demands of the position." *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Bernard Q. Phelan
PHELAN-WATSON LAW OFFICES
2206 Pioneer Avenue
Cheyenne, WY 82001
(307) 634-8085

Robert A. Long
Counsel of Record
Theodore P. Metzler
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Petitioners

---

assume that a person with a mental disability, or a person who has been treated for a mental disability, poses a direct threat to others. This would be an assumption based on fear and stereotype." H.R. Rep. No. 101-485, pt. 3, at 468. This is exactly the assumption that the jury was allowed to find reasonable under the district court's allocation of the burden of proof.

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LORRAINE "JADE" McKENZIE, Plaintiff - Appellant,

v.

MARK BENTON, IN HIS OFFICIAL CAPACITY AS SHERIFF OF NATRONA COUNTY, Defendant - Appellee.

No. 02-8024

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

(D.C. No. 98-CV-289-D)

[filed November 9, 2004]

Before HENRY, HOLLOWAY and MURPHY, Circuit Judges.

HOLLOWAY, Circuit Judge.

This case is brought under the Americans with Disabilities Act (ADA). The district court initially granted summary judgment for defendant, but following a reversal and remand by this court earlier, *McKenzie v. Dovala*, 242 F.3d 967 (10th Cir. 2001), the case was tried before a jury. The jury returned a verdict for the defendant and McKenzie again appeals.

I

PROCEDURAL HISTORY

Plaintiff Lorraine "Jade" McKenzie sued Sheriff David Dovala in his official capacity as Sheriff of Natrona County, Wyoming, alleging she was refused employment as a police officer because of her disability, in violation of the Americans with Disabilities Act (ADA). The United States District Court of the District of Wyoming exercised original

jurisdiction over this cause under 28 U.S.C. § 1343(a)(4) and 28 U.S.C. § 1331 since it had presented to it a claim under the ADA, 42 U.S.C. 12101 *et. seq.* This court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

The District Court initially granted summary judgment for the defendant. We exercised jurisdiction on appeal under 28 U.S.C. § 1291, reversed that summary judgment, and remanded the case for trial. In the interim, Sheriff Dovala was succeeded by defendant Sheriff Mark Benton, the current sheriff.

As mandated by this court, the issues considered by the jury were whether McKenzie was qualified for a position within the Natrona County Sheriff's Office; whether she had a record of impairment or whether defendant regarded her as substantially limited in her ability to perform a class of jobs; and whether the defendant discriminated against her on the basis of her record. The jury returned a verdict for the defendant. They found that McKenzie was "disabled" under the law, that she was otherwise qualified, and that the defendants had "discriminated" against her because of disability. However, they also found that she posed a "direct threat" to the health and safety of herself and her co-workers. Because McKenzie posed such a "direct threat," the jury found she was therefore not qualified to be a peace officer.

Judgment on the jury verdict in favor of the defendant was entered on February 21, 2002. The notice of appeal was filed on February 27, 2002 and is therefore timely under Fed. R. App. P. Rule 4(a)(1).

II

STATEMENT OF FACTS

McKenzie was a deputy sheriff with the Natrona County Sheriff's Office in Casper, Wyoming for ten years. During this time she reached the rank of sergeant, performing the duties of shift supervisor and never had a negative

performance evaluation. Beginning in early 1996, McKenzie suffered from a variety of psychological afflictions, including post-traumatic stress disorder (PTSD) related to childhood sexual abuse by her father. As her condition worsened, she began to miss work frequently.

On August 15, 1996, McKenzie fired six rounds from her off-duty revolver into the ground at her father's grave. The next day, Sheriff Dovala placed her on administrative leave and told her she would have to undergo a psychological evaluation by Dr. Robert Wihera, Ph.D., before she could return to duty. In the weeks that followed, McKenzie suffered serious self-inflicted wounds and drug overdoses requiring several hospital visits. On September 30, 1996, Dr. Arlene Viray, McKenzie's psychiatrist, wrote a letter to then Undersheriff Benton, stating that McKenzie's return to her previous position might be hazardous to McKenzie and to the public and that further extensive evaluation is necessary. This letter was never withdrawn by Dr. Viray. After being told that her leave pay was exhausted, McKenzie resigned voluntarily in October 1996 to seek psychological care. She was assured that she would be considered for re-employment for any openings in the Department in the future.

In late November of 1996, after a course of medication and therapy, McKenzie was released by her supervising psychiatrist, Dr. Viray. Before her resignation and before seeing Dr. Viray, McKenzie had seen Darlene Bayu, a licensed counselor. After Dr. Viray sent the Sheriff a letter stating that McKenzie's condition had improved sufficiently so that she could return to work, McKenzie immediately sought re-employment at the Sheriff's Office and was assured that her application would be considered if openings became available.

It should be noted that Dr. Viray stated that this letter said nothing about future work performance or disability nor does it document any testing or evaluation. Dr. Viray

testified at trial that she could not state that McKenzie is able to return to her prior duties because she has no idea what those duties are or what the essential functions of McKenzie's job are. In addition, Dr. Viray stated that McKenzie's PTSD does not have a linear progression, but rather is an episodic/crisis type condition, where there are peaks and valleys and no way to identify when McKenzie might experience problems again. Dr. Viray testified at trial that there are no guarantees McKenzie could return to work and she had no opinion whether McKenzie was a direct threat to herself or her fellow officers.

McKenzie's application for employment was rejected at all the agencies to which she applied throughout Wyoming and Nevada. Unable to find work in law enforcement anywhere in the area, McKenzie returned to the Sheriff's Office in October 1997 and asked to be considered for a position as a patrol officer or any other job in the department. Sheriff Dovala told McKenzie that he was unwilling to consider her application, even if she passed a psychological evaluation, and admitted that the Office was reluctant to hire her because of "liability" concerns and fear of public uneasiness related to her past illness. Sheriff Dovala said that members of his staff told him that "based upon what they knew about what had happened in the previous year," McKenzie "would be better off in some other field."

Sheriff Dovala admitted to McKenzie that he had passed over her application when positions became available in the department between November 1996 and October 1997. He acknowledged that when McKenzie visited with him in October 1997, he had met with his supervisors, Mark Benton and Lt. Kinghorn. Without a statutory psychological evaluation, they concluded that they were against considering McKenzie's application based on their knowledge of her prior psychological problems. *See* Wyoming's Peace Officer Standards and Training (POST) law, Wyo. Stat. Ann. § 9-1-704(b)(vii). Sheriff Dovala admitted that he did not consider

any individualized assessment of McKenzie's present psychological profile when she was excluded from consideration for reemployment.

McKenzie later learned that shortly before her resignation, former Undersheriff (now Sheriff) Mark Benton[1] n1 contacted the POST Commission to request that it revoke her certification as a peace officer. Sheriff Benton testified that a psychological evaluation is required in the hiring process, that no evaluation was performed on McKenzie, and that the Sheriff's Office rejected McKenzie's application based upon "what they knew" about her background.

At trial the defendants finished their case by calling two "expert witnesses." First, Dr. Wihera, the aforementioned psychologist, testified. He had not evaluated McKenzie. He admitted that he could not testify that McKenzie was a direct threat, but said it was "reasonable" for the Department to conclude she was a "direct threat" based on past behavior. He stated that supervisory police officers were not qualified to perform psychological exams and that such supervisors were suited only for observing behavior. He also conceded that most police supervisors are unfamiliar with the "course" of PTSD, that over half of all people who have PTSD symptoms can recover within one year and PTSD is something one can recover from. He acknowledged that a psychological exam would be a way of determining whether someone had recovered from PTSD.

The other expert witness was Officer Tom Walton, a Chicago police supervisor. McKenzie objected that Officer Walton's opinion of the reasonableness of the conduct of the defendants in screening her out was irrelevant since such action must be based on an individualized assessment or

---

[1] Since the beginning of this law suit, Benton replaced Dovala as Sheriff of Natrona County

other recent objective evidence. On voir dire Officer Walton said he was not offering an opinion as to the reasonableness of the defendants' conduct as it related to compliance with the ADA, but only with respect to what a reasonable police supervisor would do.

Officer Walton testified that it would be "totally improper" to re-hire McKenzie because she had engaged in dangerous behavior in shooting her father's grave. He also reviewed the medical/mental health history of the plaintiff and concluded that the mental health "history" of impairment precluded the reasonableness of re-hiring McKenzie. On cross-examination, Officer Walton admitted that his opinion was based solely on his knowledge of the mental health history of McKenzie; that he claimed no expertise in PTSD other than what he had read in the VFW journal.

In addition to the testimony of Sheriffs Benton and Dovala and their experts, the defendant called Officers Hadlock, Rostad, Walsh, Laing, Davy, Kinghorn, and Potter, all of whom testified about their contacts with McKenzie before, during and after her illness in 1996, and said they would have trouble working with McKenzie due to their knowledge of her past disability as that affected their concerns about "trust," "confidence," and "comfort."

Although the jury found that McKenzie was "disabled" under the law, that she was "otherwise qualified," and that the defendants had "discriminated" against her because of disability, they also found that McKenzie posed a "direct threat" to herself or other officers, and therefore was not "qualified" to be a peace officer. As a result, the jury returned a verdict for the defendant, and this appeal followed.

III

ISSUES PRESENTED

In her appeal, McKenzie asserts three claims of error. First, she argues that the district court abused its discretion when it admitted expert testimony from Dr. Wihera and Officer Walton who testified about the reasonableness of defendant's actions based upon knowledge of plaintiff's record of impairment, but without conducting an individual assessment. Second, she argues the district court erred when it failed to adopt her proposed jury instruction # 17, which specified that disability and disability-related conduct should be treated the same (but did not address the exception where either disability or disability-related conduct constitutes a "direct threat.") Third, she says the trial court erred in instructing the jury that she, and not her employer, bore the burden of proving whether or not she posed a direct threat to herself or others, which would preclude her from the employment at issue. We hold that McKenzie's claims of error lack merit and accordingly affirm.

IV

DISCUSSION

We will first address McKenzie's contentions that the district court erred by refusing to give her proposed Instruction No. 17, and that the District Court erred in admitting the expert testimony of Dr. Wihera and Officer Walton. We hold these contentions to be without merit. We also find that the district court did not commit reversible error in instructing the jury that McKenzie bore the burden of proving she did not pose a "direct threat" and will address this question following our analysis of her first two arguments.

1. Whether the district judge erred by refusing to give McKenzie's Instruction No. 17

McKenzie contends that the district judge abused his discretion by refusing to give the jury Plaintiff's Instruction No. 17. We disagree.

It is well settled that "the omission or exclusion of a particular jury instruction is left to the sound discretion of the trial court." *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 771 (10th Cir. 1999). This court reviews the district court's decision "to give a particular jury instruction for abuse of discretion." *Garrison v. Baker Hughes*, 287 F.3d 955, 963 (10th Cir. 2002) (citations and quotation marks omitted). As long as "the charge as a whole adequately states the law, the refusal to give a particular instruction is not an abuse of discretion." *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 473 (10th Cir. 1990).

McKenzie's proposed Instruction No. 17 stated:

> The ADA's anti-discrimination provision does not contemplate a stark dichotomy between "disability" and "disability-caused misconduct," but rather protects both. Therefore, since mental illness is manifested by abnormal behavior and is diagnosed on the basis of abnormal behavior, the ADA does not permit an employer to discriminate against a qualified person with a disability based on conduct related to her mental illness.
>
> Under the ADA an employer should consider whether a mentally disabled employee's purported misconduct could be remedied through a reasonable accommodation. If no reasonable accommodation can be provided, an employer may discriminate against an employee for conduct only if the conduct

> poses a present direct threat to the health and safety of others. Otherwise, an employer must tolerate eccentric or unusual conduct caused by the employee's mental disability so long as an employee can satisfactorily perform the essential functions of her job.
>
> VI App. 996.

McKenzie asserts that it was reversible error to fail to instruct the jury that the ADA's anti-discrimination provision does not contemplate a stark dichotomy between "disability" and "disability-caused conduct," but rather protects both as we held earlier. *McKenzie*, 242 F.3d at 974; *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1088; 42 U.S.C. § 12112(a). However, we agree with the defendant that Plaintiff's Instruction No. 17 contains a significant omission in not mentioning the "direct threat" exception to the ADA's anti-discrimination policy. The issue of "direct threat" was of importance in this trial considering the inherently dangerous nature of law enforcement.[2]

---

[2] We disagree with McKenzie's argument that the defendant could not raise the issue of "direct threat" at trial because it was not included as an affirmative defense in defendant's answer. See Brief of Appellant at 2 ("In an ADA case . . . where the employer has not affirmatively alleged that [plaintiff] poses a 'direct threat'). We note that the record shows that the issue of whether McKenzie posed a "direct threat" was included in the district court's Pretrial Order as a factual question in this case. App. 1018.

This court has stated, "'when an issue is set forth in the pretrial order, it is not necessary to amend previously filed pleadings' because 'the pretrial order is the controlling document for trial . . . the inclusion of a claim in the pretrial order is deemed to amend any previous pleadings which did not include that claim.'" *Wilson v. Muckala*, 303 F.3d 1207, 1215 (10th Cir. 2002) (quoting *Expertise Inc., v. Aetna Fin. Co.*, 810 F.2d 968, 973 (10th Cir. 1987). We also note that the record shows that the "proposed" pretrial order did not contain "direct threat" as a factual issue. TK App. 1095. As defendant points out "at the request of defense counsel the issue of 'direct threat' was added, and included in the final pretrial order." (...continued)

In the requested instruction, McKenzie did not make reference to the "direct threat" exception. Instead, she asked the district judge to instruct the jury that "the ADA does not permit an employer to discriminate against a qualified person with a disability based on conduct related to her mental illness." *See* VI App. 996. The district judge accurately observed that the ADA anti-discrimination policy is "subject to narrow exceptions such as those for employees who pose a direct threat to the health or safety of others." V App. 855; *see Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1087 (10th Cir. 1997) ("An employer may take action against an employee who poses a 'direct threat' to the health or safety of other individuals in the workplace.") (citing 42 U.S.C. § 12113(b)(1994)).

We have previously held that "requested instructions that are misstatements of the law . . . are correctly refused." *United States v. McKinney*, 822 F.2d 946, 949 (10th Cir. 1987); *see also United States v. Stoddart*, 574 F.2d 1050 (10th Cir. 1978). Therefore, we hold that the district judge did not err in rejecting Plaintiff's Instruction No. 17.

2. Expert Testimony of Dr. Richard Wihera and Officer Tom Walton

McKenzie asserts that the district court erred by admitting expert testimony of Dr. Wihera and Officer Walton regarding the reasonableness of defendant's refusing to reemploy McKenzie. We disagree.

Brief of Appellee at 50 & n.9. We agree with defendant that to the extent necessary, the pleadings have been amended to incorporate "direct threat" as an issue of fact in the instant case. Additionally, defendant has consistently asserted that McKenzie's employment would have posed a safety risk and liability concern in the inherently dangerous profession of law enforcement.

Under the Federal Rules of Evidence the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1999). Federal Rule of Evidence 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In *Daubert* the Court held that the "general acceptance" test for the admissibility of novel scientific evidence formulated in *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923) was superseded by the adoption of the Federal Rules of Evidence. *Daubert* teaches that a district judge, when he encounters a proffer of expert scientific testimony, "must determine at the outset, pursuant to [Fed.R.Evid.] 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Id.* at 592. In this way the district judge under *Daubert*, "performs an important gatekeeping role in assessing scientific evidence." *Hollander v. Sandoz Pharmaceuticals Corp.*, 289 F.3d 1193, 1204 (10th Cir. 2002).

A. Dr. Richard Wihera

We agree with defendant's argument that the district judge's decision to admit the expert testimony of Dr. Wihera should be reviewed for plain error. McKenzie specifically

objected to Dr. Wihera's "qualifications" during his testimony. V App. 757. On appeal, McKenzie raises an argument concerning whether Dr. Wihera's testimony was "relevant." Brief of Appellant at 47-48. Because McKenzie did not timely object to the "relevance" of Dr. Wihera's testimony, we review for plain error only.

In civil cases, "the 'plain error' exception . . . has been limited to errors which seriously affect 'the fairness, integrity or public reputation of judicial proceedings.'" *McEwen v. City of Norman, Okla.*, 926 F.2d 1539, 1545 (10th Cir. 1991) (quoting *Karns v. Emerson Elec. Co.*, 817 F.2d 1452, 1460 (10th Cir. 1987)). The "miscarriage of justice" must be "patently erroneous and prejudicial." *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1516 (10th Cir. 1984), *aff'd on other grounds*; 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985).

The district judge did not commit plain error by allowing Dr. Wihera to testify as an expert. He is an expert in law enforcement qualification standards who has performed "about 15,000 to 20,000 pre-employment evaluations" concerning law enforcement personnel qualifications. V App. 754. He has worked "for agencies in about 15 different states" and has done extensive work with Wyoming law enforcement agencies, including the Natrona County Sheriff's Department. *Id.* Drawing on this experience, Dr. Wihera testified that "the sheriff's department acted in a reasonable manner in not pursuing [McKenzie's] application based upon the behaviors she had displayed in the past." *Id.* at 761. We agree with the defendant that this testimony is particularly relevant because it assisted "the trier of fact to understand or determine" (*Daubert*, 509 U.S. at 592) the factual question of whether McKenzie was a qualified person with a disability.

The ADA states:

> A qualified individual with a disability. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position as such individual holds or desires.

42 U.S.C. § 12111(8).

We note that McKenzie had an opportunity to cross-examine Dr. Wihera before the jury. *Black v. M & W Gear Co.*, 269 F.3d 1220, 1231 (10th Cir. 2001) (holding no plain error existed in admission of expert testimony and noting that appellant cross-examined the expert). Additionally, McKenzie was permitted to *voir dire* Dr. Wihera before the jury in order to reveal any questions about his "qualifications." V App. 757-60.

We agree with the defendant that the district court did not err when it allowed Dr. Wihera to testify as an expert. We hold that there was no error which affected the "fairness, integrity or public reputation of the judicial proceedings," *McEwen*, 926 F.2d at 1545 (citations and quotation marks omitted). In sum it does not appear that the district judge made any error in admitting Dr. Wihera's testimony.

B. Officer Tom Walton

McKenzie also argues that the district judge should have excluded the testimony of Officer Walton because it was not relevant. Again, we do not agree. This court reviews "the admission or exclusion of expert testimony for abuse of discretion." *United States v. Arney*, 248 F.3d 984, 990 (10th Cir. 2001). We give substantial deference to the district judge's application of *Daubert*. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999) ("The trial judge must have considerable

leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable"). The abuse of discretion standard assures that "a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *McEwen*, 926 F.2d at 1553-54 (10th Cir. 1991). The *Daubert* test "ensures that the proffered evidence is both 'reliable' and 'relevant.'" *Hollander*, 289 F.3d at 1204 (quoting *Daubert*, 509 U.S. at 589). Reliability is judged by examining "whether the reasoning or methodology underlying the testimony is scientifically valid." *Daubert*, 509 U.S. at 592-93. Relevance is evaluated based on "whether [that] reasoning or methodology properly can be applied to the facts in issue." *Id.* at 593.

On appeal, McKenzie here focuses on the district court's application of the "relevance" prong of the *Daubert* inquiry. Brief of Appellant at 44, 47. We do not feel that the district judge abused his discretion in finding that Officer Walton's testimony could be "applied to the facts in issue" in this case. *Daubert*, 509 U.S. at 593. As mentioned above, "Rule 702 . . . requires that the evidence or testimony 'assist the trier of fact to understand the evidence or to determine a fact in issue.' This condition goes primarily to relevance." *Daubert*, 509 U.S. at 591. "'Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.'" *Id.* (quoting 3 Weinstein & Berger ¶ 702[02], p. 702-18). *See also United States v. Downing*, 753 F.2d 1224, 1242 (3rd Cir. 1985) ("An additional consideration under Rule 702 - and another aspect of relevancy - is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute"). The consideration "has been aptly described by Judge Becker as one of 'fit.'" *Daubert*, 509 U.S. at 591 (quoting *Downing*, 753 F.2d at 1242). Rule 702's "'helpfulness' standard requires a valid scientific connection to the pertinent inquiry

as a precondition to admissibility." *Daubert*, 509 U.S. at 591-92.

Officer Walton is a Deputy Chief of the Patrol Division in the Chicago Police Department. V App. 786. At the time of the trial, Officer Walton had served nearly thirty years with the Department, including twenty-two years in "patrol operatio4ns," four years as "a director of training and education," and held the position of "certified police instructor." V App. 786. We agree with the defendant that the district judge could consider Officer Walton's testimony, V App. 791-97, regarding the "duties, responsibilities, and rigors of the law enforcement profession" as helpful to the jury in determining whether McKenzie was a qualified individual or whether it was "objectively reasonable" for defendant to not consider rehiring McKenzie. *Bragdon v. Abbott*, 524 U.S. 624, 650, 141 L. Ed. 2d 540, 118 S. Ct. 2196 (holding that "objective reasonableness" is a relevant inquiry).

Further, Officer Walton's testimony was also relevant to the jury's examination of whether McKenzie was a "direct threat" to herself or others. In Jury Instruction No. 21,[3] which

---

[3] Jury Instruction No. 21 stated:

> The term "direct threat" means a significant risk to the health or safety of herself or others that cannot be eliminated by reasonable accommodation.
>
> There are several factors used to determine whether an individual poses a direct threat. These factors include:
>
> 1. The duration of the risk;
> 2. The nature and severity of the potential harm;
> 3. The likelihood that the potential harm will occur; and
> 4. The imminence of the potential harm.
>
> These factors are to be evaluated based on an individualized assessment of the individual's present ability to safely perform

(...continued)

concerned "direct threat," the jury was asked to determine the "duration, magnitude and likelihood of the potential harm posed by" McKenzie. Brief of Appellee at 67-68. We believe that Officer Walton's testimony regarding the dangerous nature of law enforcement, and the need for good judgment and self-control, was relevant in assisting the jury in making this determination. V App. 796-97.[4] Thus, we hold that the district court did not err in admitting Officer Walton's testimony.

3. The claim that there was error by instructing the jury that it was McKenzie's burden to prove she did not pose a "direct threat" to herself or others

McKenzie argues that the district court erred in instructing the jury that in cases involving an inherently dangerous job, an individual with a disability bears the burden of proving that she did not pose a direct threat. We do not agree.

> the essential functions of the job. Further, they are to be evaluated based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence
>
> The ADA does not require an independent medical examination when there is available objective evidence. The ADA uses the conjunctive "and/or" between medical knowledge and objective evidence. As such, the determination whether an employee presents a "direct threat" may be based on valued medical analyses and/or on other objective evidence. VI App. 985.

[4] "You're often in hazardous situations, risky situations, situations in which judgment is - is critical. You make quick decisions often under very tense, uncertain, very rapidly involving [sic] circumstances, pressure-filled circumstances. You need to enforce the law within the law. You need to have control of yourself. Anger management is absolutely critical because you will be tested to the limit. You need to be able to stay professional and control your emotions and not react in an emotional way." V App. 796-97 (Officer Walton's testimony).

This court reviews *de novo* "a timely challenge to a jury instruction to determine whether, considering the instructions as a whole, the jury was misled." *Wilson v. Muckala*, M.D., 303 F.3d 1207, 1214 (10th Cir. 2002). "In reviewing such allegations, this court examines the record as a whole to determine whether the instructions state the applicable law and provide the jury with an appropriate understanding of the issues and the legal standards to apply." *Faulkner v. Super Valu Stores*, 3 F.3d 1419, 1424 (10th Cir. 1993).

McKenzie asserts that "failing to accurately describe the elements of a *prima facie* case and shifting the burden of proving absence of an affirmative defense is reversible err [sic]." Brief of Appellant at 31. She takes issue with the district judge's instruction to the jury that for Plaintiff to establish her claim of unlawful discrimination by Defendant, she had the burden to prove by a preponderance of the evidence that, *inter alia*, "Plaintiff, at the time she sought re-employment with the Natrona County Sheriff's Office, did not pose a direct threat to herself or others." Brief of Appellant at 30-31 (quoting Jury Instruction No. 8, 6 App. 972). Additionally, McKenzie objects to Jury Instruction No. 20, which stated:

> In order to show that she is qualified to work in an inherently dangerous occupation, plaintiff must prove by a preponderance of the evidence that she did not pose a direct threat to herself or others.
>
> Jury Instruction No. 20, 6 App. 984.

McKenzie contends that whether "an employer may justifiably exclude an otherwise qualified individual with a disability because that person poses a 'direct threat' to the health and safety of others is an affirmative defense the burden of proof of which lies with the defendant employer." Brief of Appellant at 3 (citing 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.2(r); *Den Hartog v. Wasatch Academy*, 129

F.3d 1076 (10th Cir. 1997); *McKenzie v. Dovala*, 242 F.3d 967 (10th Cir. 2001)).

This circuit first considered the question of "direct threat" under the ADA, as codified in 42 U.S.C. §§ 12111(3) and §§ 12113, in *Den Hartog*, 129 F.3d 1076, *supra*. In *Den Hartog*, we categorized the existence of a "direct threat" as an "affirmative defense" to a charge of disability discrimination, and noted that: "without running afoul of the ADA, an employer may define a qualification for any job that 'an individual shall not pose a direct threat to the health or safety of [the individual himself] or other individuals in the workplace.'" *Id* at 1088 (emphasis added). We did not address which party bears the burden of proving "direct threat." In analyzing *Den Herzog*, however, we discussed both the arguments raised by defendant asserting that plaintiff did constitute a direct threat, and the arguments by plaintiff refuting that position. *Id* at 1089.

We revisited the "direct threat" question three years later in *Borgialli v. Thunder Basin Coal Co.*, 235 F.3d 1284 (10th Cir. 2000). There, this court discussed the split among the federal appellate courts regarding which party bears the burden of proof on the presence or lack of a "direct threat." *Id* at 1291-94. However we did not expressly state which rule we would follow. We noted some precedent which placed the burden of proof at all times on the employee. *See Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996), *cert denied*, 519 U.S. 1118, 136 L. Ed. 2d 849, 117 S. Ct. 964 (1997) ("the employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available.") On the other hand, we have relied on the Fifth Circuit's *Rizzo v. Children's World Learning Centers, Inc.*, which stated that "it is unclear from the statutory scheme who has the burden on this issue. It may depend on the facts of the particular case." 213 F.3d 209, 213, n.4 (5th Cir. 2000). *Rizzo* suggests, and *Borgialli*, 235 F.3d at 1294, concurs that the burden may

fall on the employer, but with an exception: "where the essential job duties necessarily implicate the safety of others, [then] the burden may be on the plaintiff to show that she can perform those functions without endangering others . . . ." *Rizzo*, 213 F.3d at 213, n.4 (citations omitted).

In connection with performance of essential job functions, we note the following analysis in *E.E.O.C. v. Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997):

> Where those essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others. There may be other cases under Title I where the issue of direct threat is not tied to the issue of essential job functions but is purely a matter of defense, on which the defendant would bear the burden. . ."[5]

The instant case does not involve some of the circumstances of *Amego, Inc.*, such as the safety of others where the essential functions of a job involve the care of others unable to care for themselves. 110 F.3d at 143. However here there is a special risk to others, co-workers and the public, who are exposed to the danger of a firearm in the control of McKenzie. Moreover McKenzie's erratic instances of behavior must be considered as well. We are, therefore,

---

[5] *But see Hargrave v. Vermont*, 340 F.3d 27, 35 (2nd Cir. 2003) ("In the employment context, it is the defendant's burden to establish that a plaintiff poses a 'direct threat' of harm to others, *see Lovejoy-Wilson* [v. NOCO Motor Fuel, Inc.,] 263 F.3d [208,] 220 [(2001)] (citing legislative history of the ADA, H.R.Rep. No. 101-485, pt. 3, at 46 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 469."); *Hutton v. Elf Altochem N. Am. Inc.*, 273 F.3d 884, 893 (9th Cir. 2001) ("Because it is an affirmative defense, the employer bears the burden of proving that an employee constitutes a direct threat.")

persuaded that it is proper for the defendant-employer here to consider the direct threat factor in connection with possible re-employment of McKenzie. And, likewise, we are convinced it was not error for the trial judge to instruct the jury that McKenzie bore the burden of proof on not being a direct threat. The job qualifications here properly included the essential function of performing McKenzie's duties without endangering her co-workers or members of the public with whom she came in contact.

We dealt with the "direct threat" question in our earlier consideration of the facts of this instant case. In *McKenzie v. Dovala*, 242 F.3d 967, *supra*, we reversed a summary judgment for defendant-employer Dovala, then Sheriff of Natrona County, concluding that McKenzie had successfully made out her prima facie case under the ADA and submitted sufficient evidence to raise issues of material fact appropriately determined by a jury. We cited our earlier opinion in *Borgialli*, 235 F.3d at 1295, and stated that it held that "a disabled plaintiff, to show she is qualified to work in an inherently dangerous job, must show that she does not pose a direct threat to others." *McKenzie v. Dovala*, 242 F.3d at 974.

On remand of this case, the parties agreed to stipulate that the occupation in question was "inherently dangerous." Aplt. App. vol. 4 p. 618. Then, over plaintiff's objection, the district court adopted a jury instruction placing the burden of showing she would not be a "direct threat" on the plaintiff McKenzie.

We hold that the district court did not err in placing that burden on the plaintiff here. The notion that an employee might constitute a "direct threat" to persons in the workplace, and the permissible conduct of an employer in such circumstances, is discussed in the ADA at sections 42 U.S.C. § 12113(a), § 12113(b), § 12111(3), and also in related

language at § 12112(b)(6). Section 12113(a), under the heading "Defenses," states the following:

> It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter."
> 42 U.S.C. § 12113(a).

Thus "direct threat" is addressed under "Defenses." However, the statute further states that "the term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Id.* § 12113(b). Moreover the plaintiff had demonstrated clearly reckless use of her department issued off duty firearm when she fired six shots into her father's grave. McKenzie's irresponsible conduct could have tragic consequences if it reoccurred while she was on duty. In addition, evidence was presented at trial of McKenzie engaging in violent conduct which had the potential to be a direct threat to others and which, in fact, led to physical harm to herself.[6] As a result, not only was the

---

[6] The jury heard testimony that McKenzie was committed to a mental hospital due to concerns regarding safety and the failure of out-patient treatment, App. 1108-27, McKenzie was found by police on a mountain after having cut her wrist. App. 1128-29. Subsequently, Dr. Viray indicated that McKenzie's self-mutilation was continuing and that McKenzie was punching walls in anger. Three days later, McKenzie talks about suicide and admits self-mutilation. App. 1131. The same day, McKenzie is found by an employee at Crestview Hospital on a patio (...continued)

occupation in question "inherently dangerous," as stipulated by the parties, but McKenzie demonstrated particularly reckless and dangerous conduct. We hold that under these circumstances, the district court did not err by instructing the jury that the burden rested on the plaintiff to prove that she did not pose a "direct threat" to others in the workplace.

AFFIRMED.

---

punching boards and screaming "let me out of the box." App. 1132-40. A little over two weeks later, McKenzie was found at a motel after overdosing on medication. App. 1141-49.

UNITED STATES DISTRICT COURT

DISTRICT OF WYOMING

LORRAINE "JADE" McKENZIE

v.

MARK BENTON, in his official capacity
as Sheriff of Natrona County

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 98-CV-289-D

This action came before the Court for a trial by jury, the Honorable William F. Downes, Chief District Judge, presiding. The issues have been tried and the jury has rendered its verdict.

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff take nothing and that the action be dismissed on the merits. Fees and costs shall be addressed after the parties have made the appropriate filings.

Feb. 21, 2002 /s/

United States District Judge

LORRAINE "JADE" MCKENZIE, Plaintiff-Appellant,

v.

DAVID DOVALA, in his official capacity as Sheriff of Natrona County, Defendant-Appellee.

No. 99-8084

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

March 13, 2001, Filed

Before BALDOCK, POLITZ* and LUCERO, Circuit Judges.

LUCERO, Circuit Judge.

Plaintiff Lorraine "Jade" McKenzie sued her former employer, the Natrona County Sheriff's Office, for an alleged violation of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101-12213. The United States District Court for the District of Wyoming granted summary judgment in favor of defendant, and plaintiff appealed. Exercising jurisdiction under 28 U.S.C. § 1291, we conclude McKenzie made out a prima facie case of discrimination under the ADA and therefore reverse.

I

McKenzie worked as a deputy sheriff with the Natrona County Sheriff's Office in Casper, Wyoming for ten years. In her decade of service, she reached the rank of sergeant within the organization, performing the duties of shift supervisor, and never had a negative performance evaluation. Beginning in early 1996, McKenzie suffered from a variety of psychological afflictions, including post-traumatic stress

---

* The Honorable Henry A. Politz, Circuit Judge for the United States Court of Appeals for the Fifth Circuit, sitting by designation.

disorder related to childhood sexual abuse by her father.[1] As her condition worsened, she began to miss work frequently. Then, on August 15, 1996, McKenzie fired six rounds from her revolver into the ground at her father's grave; the next day, Sheriff David Dovala placed her on administrative leave. In the weeks that followed McKenzie suffered serious self-inflicted wounds and drug overdoses requiring several hospital visits. After being told that her leave pay was exhausted, McKenzie resigned voluntarily in October 1996 to seek psychological care.

In late November of the same year, after a course of medication and therapy, McKenzie was released by her supervising physician, Dr. Arlene Viray. After Dr. Viray sent the Sheriff a letter stating McKenzie's condition had improved sufficiently that she could return to work, McKenzie immediately sought re-employment at the Sheriff's Office and was assured that her application would be considered if openings became available. Despite her ten years of experience and her fine record as a patrol officer, McKenzie's application for employment was rejected at all the agencies to which she applied throughout Wyoming and Nevada. Unable to find work in law enforcement anywhere in the area, she returned to the Sheriff's Office in October 1997 and asked to be considered not only for a position as a patrol officer, but also for any job in the department. Dovala told McKenzie that he was unwilling to consider her application and admitted that the Office was reluctant to hire her because of "liability" concerns and fear of public uneasiness related to her past illness. (Appellant's App. at 187.) According to Dovala, members of his staff had told him that "based upon what they knew about what had

---

[1] Around the time of her resignation, McKenzie was diagnosed with post-traumatic stress disorder, adjustment disorder, borderline personality disorder, and major depressive disorder, single episode, severe.

happened in the previous year," McKenzie "would be better off in some other field." (*Id.* at 97.)

Dovala admitted to McKenzie that he had passed over her application when positions became available in the department between November 1996 and October 1997. He acknowledged that he eliminated McKenzie from consideration without ordering a standard psychological evaluation as provided for in Wyoming's Peace Officer Standards and Training ("POST") law, Wyo. Stat. Ann. § 9-1-704(b)(vii). McKenzie later learned that shortly after her resignation, Under sheriff Mark Benton[2] contacted the POST Commission to request that it revoke her certification as a peace officer.[3]

In this suit alleging discrimination prohibited by the ADA, McKenzie claims that Dovala refused to rehire her because he "regarded" her as disabled under 42 U.S.C. § 12102(2)(C) or because of her "record" of disability under § 12102(2)(B).[4] Concluding that McKenzie had not produced sufficient evidence to allow a jury to find she was "disabled" under either of those provisions, the district court granted defendant's motion for summary judgment. *McKenzie v. Dovala*, No. 98-CV-289-D, slip order at 1 (D. Wyo. Aug. 16, 1999).

---

[2] Since the initiation of this suit, Benton has replaced Dovala as Sheriff of Natrona County.

[3] Although McKenzie was not decertified by the Board upon Benton's request, her certification lapsed in October 1998, two years after her resignation.

[4] Plaintiff also brought a claim of retaliation in violation of Title VII, alleging she was denied a position because of her complaints of gender discrimination while still employed by the defendant. The district court granted summary judgment for the defendant, and that claim is not before us on appeal.

II

"We review the district court's grant of summary judgment de novo, applying the same legal standard used by the district court." *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir.) (citation omitted), *cert. denied*, 528 U.S. 815, 145 L. Ed. 2d 46, 120 S. Ct. 53 (1999). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Simms*, 165 F.3d at 1326 (citation omitted). The nonmovant is given "wide berth to prove a factual controversy exists." *Jeffries v. Kansas*, 147 F.3d 1220, 1228 (10th Cir. 1998) (quoting *Ulissey v. Shvartsman*, 61 F.3d 805, 808 (10th Cir. 1995)).

III

The ADA provides that no covered employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . the hiring . . . of employees." 42 U.S.C. § 12112(a).[5] A

---

[5] Recently, the Supreme Court held that the Eleventh Amendment bars suits by state employees to recover money damages for violations of the ADA. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 2001 U.S. LEXIS 1700, 148 L. Ed. 2d 866, 2001 WL 167628, slip op. at 16-17 (2001). Because "the Eleventh Amendment does not extend its immunity to units of local government," that decision does not call into question the applicability of the ADA to counties, which are considered units of local government. Id., slip op. at 11 (citing *Lincoln County v. Luning*, 133 U.S. 529, 530, 33 L. Ed. 766, 10 S. Ct. 363 (1890)); *cf. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81, 50 L. Ed. 2d 471, 97 S. Ct. 568 (holding a school board is not entitled to assert Eleventh (...continued)

"qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8). To establish a prima facie case of discrimination under the ADA, a plaintiff must show "(1) that she is disabled within the meaning of the ADA; (2) that she is qualified--with or without reasonable accommodation; and (3) that she was discriminated against because of [her] disability." *Aldrich v. Boeing Co.*, 146 F.3d 1265, 1269 (10th Cir. 1998) (internal quotation omitted); *see also MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1443 (10th Cir. 1996). The district court granted summary judgment for the defendant because it concluded McKenzie could not show she was "disabled" so as to satisfy the first prong of the test. *McKenzie v. Dovala*, No. 98-CV-289, tr. oral ruling at 10 (D. Wyo. Aug. 16, 1999).

A "disability" is defined by the ADA as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2); see also Sutton v. United Air Lines, Inc., 527 U.S. 471, 478, 144 L. Ed. 2d 450, 119 S. Ct. 2139 (1999). The ADA's implementing regulations, promulgated by the Equal Employment Opportunity Commission ("EEOC"), clarify what constitutes an "impairment that substantially limits . . . major life activities" under 42 U.S.C. § 12102(2)(A). Those regulations provide that "with respect to the major life activity of working . . . the term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person

---

Amendment immunity because it more closely resembles a county or city than an arm of the state).

having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i).

A. Disability

The district court concluded there was no genuine issue for trial as to whether McKenzie has a "disability" as defined in the ADA, 42 U.S.C. § 12102(2). McKenzie does not allege she had an actual limiting impairment at the time she sought re-employment. To the contrary, she testified that she was healthy and had obtained permission to resume work. Instead, McKenzie contends she suffered discrimination because she was "regarded as" disabled or, alternatively, because of a "record of" disability. *Id.* § 12102(2)(C), (B).

1

McKenzie argues that she submitted evidence creating a genuine issue of material fact as to whether the defendant "regarded" her as disabled. *See id.* § 12102(2)(C). Under this theory of disability, she sought to establish that she "has none of the impairments defined in . . . this section but is treated by a covered entity as having a substantially limiting impairment," 29 C.F.R. § 1630.2(l)(3), arguing on summary judgment that she was "treated" by the Sheriff's Office as significantly restricted in her ability to perform the class of jobs under the broad heading of law enforcement.

The district court had before it abundant evidence supporting McKenzie's claim that she was regarded as disabled. Soon after McKenzie's resignation, Benton sought to have her decertified by the POST Commission because, as he explained, he lacked "trust" and "confidence" in her and "didn't feel that [she] should be a law enforcement officer any longer." (Appellant's App. at 115.) Because certification as a peace officer requires that an individual "be free of any physical, emotional or mental conditions which might adversely affect [her] performance of duty," Wyo. Stat. Ann. § 9-1-704(b)(vii), a reasonable jury could infer from

Benton's seeking decertification that Benton believed McKenzie had an "emotional or mental condition[]" that impaired her performance as a peace officer.

The testimony of Dovala and Benton suggests that at the time of McKenzie's reapplication, defendant treated her as substantially limited in her ability to work in law enforcement due to the psychological problems she had suffered in 1996. Dovala testified that when he met with McKenzie in 1997,

> I had concerns for her mainly, as a police officer, we often have to testify in court. And what generally happens, or happens frequently, is the officer is attacked. And I thought that if she had to do something, this might be brought up in court about what had happened to her in the past. And I was quite concerned that if she had to use violence, for sure, that would be brought up in court by the opposing side. And I thought she would suffer and so would the whole county.

(Appellant's App. at 97.) The following morning, the Sheriff's staff concluded at a meeting that McKenzie "would be better off in some other field." (*Id.*) Despite Dovala's admission that he "was worried about liability," he did not order a routine psychological or psychiatric examination to determine whether McKenzie was qualified to be a peace officer under Wyoming law. (*Id.* at 99.)

Benton, too, testified that at the time of McKenzie's 1997 application he was concerned about her history of "problems," as well as the possibility that fellow officers and the public would not "trust" her, and concluded that "it was [not] in her best interest or the best interest of the office for her to regain her position in law enforcement." (*Id.* at 111, 110.) He acknowledged that McKenzie was eliminated from consideration without an evaluation because of her history of

psychological problems, admitting "she didn't make it to that step." (*Id.* at 110.) Benton also testified that although he was aware McKenzie had been authorized by Dr. Viray to return to work, he "didn't care for the concept" of her return. (*Id.* at 108.)

According to the EEOC's interpretive guidelines, if an individual can show that a potential employer refused to hire her based on "myth, fear, or stereotype," including concerns regarding safety, insurance, liability, and acceptance by coworkers and the public, the individual will satisfy the "regarded as" component of the definition of disability. 29 C.F.R. pt. 1630 app. § 1630.2(l). Dovala and Benton admitted that their concerns included safety, liability, and public acceptance. The fact that defendant rejected McKenzie's application without submitting her for a standard psychological or psychiatric assessment as provided for by state law is further evidence that those concerns were based on "myths, fears, and stereotype" rather than on an individualized assessment of her qualifications.

While conceding defendant "may have considered plaintiff substantially limited in her ability to work as a deputy sheriff," the district court ruled that McKenzie failed to establish that she was regarded as unable to perform a "class of jobs" or a "broad range of jobs in various classes" as compared to others with comparable training, skills and abilities. *McKenzie v. Dovala*, No. 98-CV-289, tr. oral ruling at 8-9. "To be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than a particular job." *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 523, 144 L. Ed. 2d 484, 119 S. Ct. 2133 (1999); *see also Bowen v. Income Producing Mgmt. of Okla., Inc.*, 202 F.3d 1282, 1287 (10th Cir. 2000).

Citing that rule, defendant argues that McKenzie has not shown a substantially limiting impairment under the ADA because after her resignation from the Sheriff's Office she

worked in several different occupations, including caretaker, store clerk, and resident counselor. Contrary to this assertion, McKenzie's employment in the wake of her illness is beside the point in two respects. First, her claim under 42 U.S.C. § 12102(2)(C) is not that she currently has an impairment limiting her ability to work, but that the Sheriff's refusal to consider her application was based on his mistaken perception that she continues to suffer from such an impairment. Second, none of the positions in which McKenzie was employed during the cited period is part of the "class" of law enforcement jobs, her prior and preferred field. 29 C.F.R. § 1630.2(j)(3)(i).

The evidence McKenzie submitted shows a factual controversy as to whether defendant viewed McKenzie as limited in her ability to work in the class of jobs comprising law enforcement. Dovala's refusal to consider employing her in a less sensitive post within the Office, such as in the civil division responsible for serving papers and subpoenas, the records division, the administrative division, or the jail division, suggests that he regarded her as substantially limited in her ability to work in an entire class of jobs, not merely in the particular job of patrol officer. Additionally, by seeking to have McKenzie decertified as a "peace officer" because he "didn't feel that [she] should be a law enforcement officer any longer," defendant effectively sought to bar her from taking a job as a campus police officer, an investigator for hunting and fishing outfitters, an inspector of livestock, a park superintendent or assistant park superintendent, a park ranger, or any other post that in Wyoming falls within the definition of "peace officer." Wyo. Stat. Ann. § 7-2-101(iv). Significantly, Dovala also testified that his staff rejected McKenzie's request to reapply because "they thought that she would be better off in some other field." (Appellant's App. at 97.) These statements constitute persuasive evidence that Dovala regarded McKenzie as

unable to work in a class of jobs because of a psychological impairment.[6]

By refusing to consider her for a job in her former workplace despite ten years of successful service, the Sheriff treated her as significantly restricted "as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i). As Dovala and Benton acknowledged in their respective depositions, it is undisputed that someone with McKenzie's training, skills, and abilities, but without a psychological disability, could have been hired as a patrol officer. Viewing the factual record in the light most favorable to the plaintiff, we see a genuine issue for trial as to whether the Sheriff regarded McKenzie as disabled under the ADA.

2

Alternatively, McKenzie argues the defendant refused to consider her application on the basis of a "record" of disability. 42 U.S.C. § 12102(2)(B). A record of disability is a history of impairment that substantially limited a major life

---

[6] Our principal case rejecting a claim of disability under 42 U.S.C. § 12102(2)(C) is readily distinguishable. *Sorensen v. University of Utah Hospital*, 194 F.3d 1084, 1089 (10th Cir. 1999), in which we held that a nurse diagnosed with multiple sclerosis did not establish she was "regarded as" disabled by her employer, is inapplicable because the plaintiff in that case alleged only that the hospital regarded her as precluded from holding the position of flight nurse. The plaintiff admitted that the hospital provided her with numerous opportunities to work as a nurse in other units following her diagnosis and hospitalization. *Id.*

Likewise, in Murphy it was undisputed that the plaintiff, a mechanic, was generally employable in his preferred field. 527 U.S. at 524. He was thus unable to show that he was regarded as restricted in a class of jobs and was "at most, regarded as unable to perform only a particular job." Id. at 525. By contrast, McKenzie submitted uncontroverted evidence that, since her illness, she has been regarded as unemployable in the "class of jobs utilizing [her] skills." *Id.* at 524.

activity of a plaintiff. 29 C.F.R. § 1630.2(k); *see also Sorensen v. Univ. of Utah Hosp.*, 194 F.3d 1084, 1086-87 (10th Cir. 1999). To satisfy this definition, McKenzie therefore must establish that at some point her impairment actually did substantially limit her ability to work. Noting "it is dispositive that any arguable record of impairment related exclusively to her position of deputy sheriff," the district court concluded there was insufficient evidence to show that McKenzie ever was "significantly restricted" in either a class of jobs or a broad range of jobs in various classes. *McKenzie v. Dovala*, No. 98-CV-289, tr. oral ruling at 7-8.

In determining whether an impairment is substantially limiting such that it may support a record of disability under the ADA, the following factors are considered: "(i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact" of the impairment. 29 C.F.R. § 1630.2(j)(2). McKenzie's record of absence from work on administrative leave, along with her physicians' reports, tends to show that her ability to work was substantially limited by her illness. Her complete inability to work prior to her resignation was due in part to at least one hospital admission, suggesting that the nature and severity of her impairment were grave. Physicians' reports indicate that McKenzie suffered from psychiatric problems during the year prior to her resignation. At least as early as April 1996, she missed work because of symptoms of post-traumatic stress disorder. The duration of her illness, which kept her from working throughout much of the summer and autumn of 1996, also indicates a record of impairment. Although the permanent or long-term impact of McKenzie's illness would not tend to support a finding of disability, inasmuch as she has been released to return to work, the evidence as a whole could lead a reasonable jury to conclude that she had a record of a disability for purposes of the ADA.

When Dovala placed McKenzie on administrative leave, he told her that she would not be reinstated without "a complete psychological evaluation." (Appellant's App. at 49.) His subsequent failure to order a psychological assessment before turning down McKenzie's application suggests that his decision was based on his knowledge of her previous impairment and not on any current inability to perform the job's essential functions. This lack of an employer evaluation contrasts with McKenzie's own physician's assessment that "she is ready to return to work" and her psychotherapist's statement that she is "qualified to perform the duties of any law enforcement position for which she is technically qualified at the time she was discharged from treatment." (Appellant's App. at 145, 160.) Dovala even admitted in his deposition that the staff members' belief that McKenzie should no longer work in law enforcement was "based upon what they knew about what had happened the previous year." (*Id.* at 97.) That evidence suffices to create a genuine issue of material fact as to whether the Sheriff relied on McKenzie's history of psychiatric illness when he rejected her application.

B. Qualification

While the district court's ruling did not address the second prong of a prima facie case under the ADA, which requires a showing that the plaintiff is a qualified individual, the defendant argues that McKenzie did not establish she could perform the essential functions of the job she sought. 42 U.S.C. §§ 12112(a), 12111(8). Contrary to that assertion, McKenzie produced unrebutted evidence that she was qualified for a position within the Sheriff's Office. She submitted the following exchange from Dovala's deposition:

> Q. Excluding what you knew about Lorraine [McKenzie] relative to the events that occurred in 1996 . . . she was otherwise

> qualified for the position as a sheriff's officer, wasn't she?
>
> A. Excluding the events, yes, sir.

(Appellant's App. at 98.) In Benton's deposition, he agreed:

> Q. And excluding her history or her record of her psychological therapy, the events at the cemetery and on the mountain, was she--would she have been otherwise qualified for the position? . . .
>
> A. Yes.

(*Id.* at 110.) Dovala also acknowledged that during McKenzie's tenure, she had become a sergeant, "probably the most ranking officer in the sheriff's office" according to his testimony. (*Id.* at 94.)

Nonetheless, defendant argues that because Dr. Viray's letter did not articulate the specific tasks McKenzie was able or unable to perform at the time of her release in November 1996, the letter can not support a finding that she was qualified to work in the Sheriff's Office. That conclusion would follow only if we were to view the evidence in the light least favorable to the non-moving party, and that is not our task on review of summary judgment. *See Simms*, 165 F.3d at 1326.

The ADA's definition of a "qualified individual with a disability" includes an individual who can perform the essential functions of the job she "holds or desires." 42 U.S.C. § 12111(8) (emphasis added). Because the ADA explicitly covers job applicants as well as employees, its protection extends to a former employee with a disability who is qualified for a position she desires. *See id.* § 12112(a) (prohibiting, inter alia, "discrimination . . . in regard to job application procedures" and "the hiring . . . of employees"),

§ 12112(b)(5)(A) (stating "discriminate" includes "not making reasonable accommodations to the . . . limitations of . . . an applicant or employee" (emphasis added)); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1161 (10th Cir. 1999) (en banc) ("To read the ADA otherwise, would render the word 'desires' meaningless, and we must avoid such a construction." (citations omitted)). McKenzie asked to be considered for any existing job in the Sheriff's Office. Under the ADA, McKenzie is a "qualified individual" even if she is no longer qualified as a patrol officer as long as she can perform another job within the Sheriff's Office that she "desires." 42 U.S.C. § 12111(8).

According to defendant, McKenzie was denied employment based on conduct, including cutting her wrists and firing her gun at her father's grave, that would preclude her from passing the background check required under Wyoming law. *See* Wyo. Stat. Ann. § 9-1-704(b)(vi) (requiring background investigations for all peace officer candidates). That argument is flawed in two respects. The background investigation is conducted to determine that candidates "have good moral character." *Id.* Defendant does not argue the above-mentioned incidents are relevant to McKenzie's moral character, and such an argument would be implausible. The conduct that precipitated McKenzie's resignation reflects her illness, not an absence of "good moral character" that would cause her to fail a background investigation.[7]

More importantly, subject to narrow exceptions such as those for employees who pose a "direct threat" to the health or safety of others, *Den Hartog v. Wasatch Acad.*, 129 F.3d

---

[7] As Dovala and Benton admit, firing a gun in a cemetery, which prompted Dovala to place McKenzie on administrative leave, was not an illegal act.

1076, 1087 (10th Cir. 1997), the ADA's anti-discrimination provision "does not contemplate a stark dichotomy between 'disability' and 'disability-caused misconduct,' but rather protects both." *Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 608 (10th Cir. 1998) (quoting *Den Hartog*, 129 F.3d at 1088). In the instant case, the ADA protects McKenzie from adverse employment action based on conduct related to her illness so long as she does not pose a "direct threat." 42 U.S.C. § 12113(a), (b); *see Borgialli v. Thunder Basin Coal Co.*, 235 F.3d 1284, 1295 (10th Cir. 2000) (holding that a disabled plaintiff, to show she is qualified to work in an inherently dangerous job, must show that she does not pose a direct threat to others). A "direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3). The determination that an individual is unqualified because she poses a direct threat must be "based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job," which in turn must be based on "a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." 29 C.F.R. § 1630.2(r); *see also Den Hartog*, 129 F.3d at 1089.

Defendant has not argued that McKenzie poses a direct threat that could not be eliminated by reasonable accommodation. *See* 42 U.S.C. § 12111(3). There is no evidence suggesting in what way, once she had undergone rehabilitation and been cleared by her doctor, employing McKenzie in a position that does not require the use of force would create a direct threat to the public or to her co-workers.[8] In fact, when Benton was asked whether McKenzie

---

[8] At summary judgment, defendant alleged that employing McKenzie would create "a significant safety risk." (Appellee's App. at 41.) Even if we were to read his motion as raising a "direct threat" defense, defendant (...continued)

had "acted out in any way that . . . was detrimental to the Natrona County Sheriff's [Office] in her performance of her duties," he responded "I can't think of any at this time." (Appellant's App. at 111.) *See Den Hartog*, 129 F.3d at 1088-89 (holding that where the record contained testimony that plaintiff did not pose a direct threat, defendants were not entitled to summary judgment on the ground that plaintiff posed such a threat). As we noted above, Dovala did not even submit McKenzie for a standard psychological test as provided for by Wyo. Stat. Ann. § 9-1-704(b)(vii). Without an "individualized assessment" of the precise nature and likelihood of the risk stemming from McKenzie's illness, a genuine dispute of material fact remains regarding whether she is qualified to resume a position in the Office where she worked successfully for a decade. 29 C.F.R. § 1630.2(r). McKenzie may or may not have had a disqualifying mental condition, but that is a question for a jury to answer with all the available evidence before it.

C. Discrimination

With respect to the third and final element of her prima facie case, McKenzie submitted ample evidence that the Sheriff discriminated against her on the basis of his view that she suffered from a substantially limiting impairment. The ADA defines the term "discriminate" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship." 42 U.S.C. § 12112(b)(5)(A).

---

did not present that argument on appeal, much less support it with a "reasonable medical judgment" that relied on "the best available objective evidence." 29 C.F.R. § 1630.2(r).

Under the ADA, reasonable accommodation includes reassignment to a vacant position as well as "other similar accommodations." *Id.* § 12111(9)(B). The crux of McKenzie's case is her claim that defendant refused to accommodate her by considering her for a position in which she would not pose a threat to the public. As we noted above, *see supra* Part III.B, the ADA explicitly protects job applicants as well as employees. 42 U.S.C. § 12112(a), § 12112(b)(5)(A). According to McKenzie's deposition testimony, defendant passed over her application when openings became available at least once between her release in November 1996 and her meeting with Dovala in October 1997, and defendant has not advanced any evidence showing that there was no vacant position in one of those departments into which McKenzie could have been hired. The Sheriff's refusal to consider McKenzie for a position in, for example, the jail or the records division is evidence of discrimination under the ADA. Of course, whether McKenzie will ultimately succeed in proving that prohibited discrimination occurred is a different question, one not appropriate for consideration on summary judgment.

McKenzie submitted sufficient evidence for a reasonable jury to find that she was qualified for a position within the Sheriff's Office, that she had a record of impairment or that the defendant regarded her as substantially limited in her ability to perform a class of jobs, and that he discriminated against her on the basis of that record or belief. Dismissing her claim on summary judgment was therefore improper. While it is disputed whether McKenzie can work safely in the Sheriff's Office, that is precisely the kind of dispute traditionally resolved by a jury, not by a court at the summary judgment stage. The ADA does not require Natrona County to put its staff and the public at risk by employing an individual who poses a threat to others, but it does require the County to provide due consideration to a disabled individual

who might be able, with reasonable accommodation, to perform her work productively and safely.

IV

We REVERSE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

SELECTED PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT
(42 U.S.C. § 12101 *et seq.*)

§ 12101. Congressional findings and purpose

(a) Findings. The Congress finds that--

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose.

It is the purpose of this Act--

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

§ 12102. Definitions

As used in this Act:

* * *

(2) Disability. The term "disability" means, with respect to an individual--

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

§ 12111. Definitions

As used in this title:

* * *

(3) Direct threat. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

* * *

§ 12112. Discrimination

(a) General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of

employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

* * *

§ 12113. Defenses

(a) In general. It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this title.

(b) Qualification standards. The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

* * *

EEOC REGULATIONS

29 C.F.R. § 1630.2

* * *

(r) Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm

29 C.F.R. § 1630 App.

* * *

Section 1630.2(r) Direct Threat

An employer may require, as a qualification standard, that an individual not pose a direct threat to the health or safety of himself/herself or others. Like any other qualification standard, such a standard must apply to all applicants or employees and not just to individuals with disabilities. If, however, an individual poses a direct threat as a result of a disability, the employer must determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level. If no accommodation exists that would either eliminate or reduce the risk, the employer may refuse to

hire an applicant or may discharge an employee who poses a direct threat.

An employer, however, is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e., high probability, of substantial harm; a speculative or remote risk is insufficient. See Senate Report at 27; House Report Labor Report at 56-57; House Judiciary Report at 45.

Determining whether an individual poses a significant risk of substantial harm to others must be made on a case by case basis. The employer should identify the specific risk posed by the individual. For individuals with mental or emotional disabilities, the employer must identify the specific behavior on the part of the individual that would pose the direct threat. For individuals with physical disabilities, the employer must identify the aspect of the disability that would pose the direct threat. The employer should then consider the four factors listed in part 1630:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

Such consideration must rely on objective, factual evidence -- not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes -- about the nature or effect of a particular disability, or of disability generally. See Senate Report at 27; House Labor Report at 56-57; House Judiciary Report at 45-46. See also Strathie v. Department of Transportation, 716 F.2d 227 (3d Cir. 1983). Relevant evidence may include input from the individual with a disability, the experience of the individual with a disability in previous similar positions, and opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise in

the disability involved and/or direct knowledge of the individual with the disability.

An employer is also permitted to require that an individual not pose a direct threat of harm to his or her own safety or health. If performing the particular functions of a job would result in a high probability of substantial harm to the individual, the employer could reject or discharge the individual unless a reasonable accommodation that would not cause an undue hardship would avert the harm. For example, an employer would not be required to hire an individual, disabled by narcolepsy, who frequently and unexpectedly loses consciousness for a carpentry job the essential functions of which require the use of power saws and other dangerous equipment, where no accommodation exists that will reduce or eliminate the risk.

The assessment that there exists a high probability of substantial harm to the individual, like the assessment that there exists a high probability of substantial harm to others, must be strictly based on valid medical analyses and/or on other objective evidence. This determination must be based on individualized factual data, using the factors discussed above, rather than on stereotypic or patronizing assumptions and must consider potential reasonable accommodations. Generalized fears about risks from the employment environment, such as exacerbation of the disability caused by stress, cannot be used by an employer to disqualify an individual with a disability. For example, a law firm could not reject an applicant with a history of disabling mental illness based on a generalized fear that the stress of trying to make partner might trigger a relapse of the individual's mental illness. Nor can generalized fears about risks to individuals with disabilities in the event of an evacuation or other emergency be used by an employer to disqualify an individual with a disability. See Senate Report at 56;

House Labor Report at 73-74; House Judiciary Report at 45. See also Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985); Bentivegna v. U.S. Department of Labor, 694 F.2d 619 (9th Cir.1982).

* * *

(2)

Supreme Court, U.S.
FILED
APR 22 2005
OFFICE OF THE CLERK

No. 04-1057

IN THE

Supreme Court of the United States

LORRAINE "JADE" MCKENZIE,

Petitioner,

v.

MARK BENTON,
In His Official Capacity as Sheriff of Natrona County,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Peter Young
SCHWARTZ, BON, WALKER
& STUDER, LLC
141 South Center
Casper, WY 82601
(307) 235-6681

Erik S. Jaffe
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th St., N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Respondent

April 22, 2005

QUESTION PRESENTED

Whether an Americans with Disabilities Act plaintiff denied employment for a job the essential functions of which involve inherent danger retains the burden of proving that she is a qualified individual by showing that she can perform those functions without posing a direct threat to herself or others.

TABLE OF CONTENTS

Pages

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES ii
RESPONDENT'S BRIEF IN OPPOSITION 1
STATEMENT 1
A. Legal Framework 2
B. Facts 3
ARGUMENT 7
I. THIS CASE IS A POOR VEHICLE IN WHICH TO ADDRESS THE QUESTION PRESENTED. 8
II. THE ALLEGED SPLIT IN THIS CASE IS OVERSTATED 11
III. THE DECISION BELOW IS ABSOLUTELY FAITHFUL TO THE ADA AND THIS COURT'S DECISIONS 18
CONCLUSION 22

TABLE OF AUTHORITIES

Pages

Cases

Branham v. *Snow*, 392 F.3d 896 (CA7 2004) 16, 17
Dadian v. *Village of Wilmette*, 269 F.3d 831 (CA7 2001) 17
EEOC v. *Amego, Inc.*, 110 F.3d 135 (CA1 1997) 11
Hargrave v. *Vermont*, 340 F.3d 27 (CA2 2003) 12, 13
Hutton v. *Elf Atochem N. America, Inc.*, 273 F.3d 884 (CA9 2001) 15, 16

Lovejoy-Wilson v. *NOCO Motor Fuel, Inc.*, 263 F.3d 208 (CA2 2001) 13

Moses v. *American Nonwovens, Inc.*, 97 F.3d 446 (CA11 1996), *cert. denied*, 519 US 1118 (1997) 11, 12

Nunes v. *Wal-Mart Stores, Inc.*, 164 F.3d 1243 (CA9 1999) 15

Rizzo v. *Children's World Learning Centers, Inc.*, 173 F.3d 254 (CA5 1999), *aff'd*, 213 F.3d 209 (CA5) (*en banc*), *cert. denied*, 531 U.S. 958 (2000) 14

Rizzo v. *Children's World Learning Centers, Inc.*, 213 F.3d 209 (CA5) (*en banc*), *cert. denied*, 531 U.S. 958 (2000) 14, 15, 22

School Bd. of Nassau Cty. v. *Arline*, 480 U.S. 273 (1987) 2, 18

The Monrosa v. *Carbon Black, Inc.*, 359 U.S. 180 (1959) 10

Waddell v. *Valley Forge Dental Assocs.*, 276 F.3d 1275 (CA11 2001), *cert. denied*, 535 U.S. 1096 (2002) 12

Statutes

42 U.S.C. § 12112 ..... 2, 3, 18, 19

42 U.S.C. § 12113 ..... passim

Rules

FED. R. CIV. PRO. 50 10

FED. R. CIV. PRO. 61 10

Other Authorities

H.R. Rep. No. 101-485 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445 3

IN THE

Supreme Court of the United States

LORRAINE "JADE" MCKENZIE,

Petitioner,

v.

MARK BENTON,
In His Official Capacity as Sheriff of Natrona County,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

For the following reasons, Respondent respectfully suggests that the Petition for a Writ of Certiorari should be denied.

STATEMENT

This case involves the narrow issue, addressed by only a few courts, of whether an Americans with Disabilities Act ("ADA") plaintiff denied a job the essential functions of which entail inherent dangers to herself and others, bears the burden of proving that she is qualified for that job by showing that she will not pose a direct threat to herself and others in the performance of those essential functions.

Petitioner, a former deputy sheriff, voluntarily resigned from the Sheriff's Office after a series of violent, self-

destructive, and dangerous episodes brought on by a newly occurring mental illness. Petitioner subsequently was denied re-employment with the Sheriff's Office based on conduct showing that she posed a threat to herself and others in the inherently dangerous field of law enforcement. A jury agreed that Petitioner posed a direct threat, was therefore not a qualified individual for the job she sought, and returned a verdict for Respondent. The Tenth Circuit affirmed.

A. Legal Framework

The ADA provides that a covered employer may not "discriminate against a *qualified individual with a disability* because of the disability of such individual in regard to" hiring and other aspects of employment. 42 U.S.C. § 12112(a) (emphasis added). It is well-established that an ADA plaintiff bears the burden of proving that she is a qualified individual in order to bring a claim for discrimination in hiring. Pet. App. 28a (initial CA10 opinion reversing summary judgment) (citing multiple cases). The ADA defines the term "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, *can perform the essential functions* of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (emphasis added). Such essential functions, in turn, can be defined, in part, by "qualification standards," which "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b); *see also School Bd. of Nassau Cty.* v. *Arline*, 480 U.S. 273, 287 n. 16 (1987) (Rehabilitation Act case stating that a "person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk").[1]

---

[1] Rehabilitation Act cases generally are read in *pari materia* with ADA cases. That is particularly true in the context of the direct threat provision, which was intended to codify in the ADA the Rehabilitation Act standard

Insofar as a plaintiff cannot satisfy the relevant qualifications for a particular job, and thus would not be a "qualified individual" capable of establishing a hiring discrimination claim, she may still claim, under a different aspect of the ADA, that the use of the qualification standards themselves discriminates in that such standards "*screen out or tend to screen out* an individual with a disability or a class of individuals with disabilities * * *." 42 U.S.C. § 12112(b)(6).

If a plaintiff successfully raises and establishes such an alternative discrimination claim, an employer may still defend the qualification standard itself on the grounds that it is job related and consistent with business necessity. *Id.* (excluding from the definition of discrimination the use of a qualification standard that "*is shown to be job-related for the position in question and is consistent with business necessity* ...."); *see also* 42 U.S.C. § 12113(a) ("It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards * * * [that screen out the disabled] has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter."). That "defense," however, goes to the *validity* of the qualification standard *vel non*; it does not relate to the *satisfaction* of a valid qualification standard, which remains an aspect of determining whether the plaintiff is a "qualified individual."

B. Facts

Prior to the events giving rise to this case, Petitioner McKenzie had been a deputy sheriff in the Natrona County Sheriff's Office for 10 years. In 1996, however, petitioner began to experience post-traumatic stress disorder ("PTSD") in connection with childhood sexual abuse by her father. Pet.

---

set forth in the *Arline* case itself. *See* House Judiciary Comm. Report on the ADA, H.R. Rep. No. 101-485, pt. 3, at 34, 45 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 457, 468.

App. 3a. As a result, her conduct and behavior took a dramatic and dangerous turn for the worse. Pet. App. 3a-4a.

On August 15, 1996, Petitioner was found at the Memorial Garden Cemetery, in Casper, Wyoming firing her service revolver into the grave of her dead father and having overdosed on prescription medications. Pet. App. 3a; 4 Appellant's App. 525-26.[2] Petitioner had no idea how or why she ended up at the cemetery and admitted that she has no memory of driving to the cemetery or the events leading up to this episode. 3 Appellant's App. 306. Law enforcement officers dispatched to the scene described Petitioner as intoxicated and irrational and believed that she was a danger both to herself and to the public. 4 Appellant's App. 511-19. One of the officers testified at trial that Petitioner's discharge of a firearm was reckless and that driving in her condition would have constituted a DUI. 4 Appellant's App. 525-26 (testimony of Officer Hadlock). Following that event, Petitioner was admitted into Crestview Psychiatric Unit and placed on administrative leave. Appellee's App. 1108-1109. After seven days of intensive psychiatric treatment, petitioner was released from the psychiatric unit on condition that she participate in outpatient treatment and supervision. Appellee's App. 1105-07.

On August 27, 1996, Petitioner called the hospital demanding to speak with another patient and indicated that she intended to harm herself. Law enforcement officers dispatched to her apartment failed to find her but discovered a message indicating that plaintiff did not know the difference between reality and fantasy. 4 Appellant's App. 527-530. A search by the local authorities ensued. Petitioner was eventually located at Lookout Point on Casper Mountain. She had cut her wrist, was intoxicated, and could barely speak. Appel-

---

[2] "__ Appellant's App." refers to the various volumes of the Appellant's Appendix in the Court of Appeals. "Appellee's. App." refers to the single volume of the Appellee's Appendix in the Court of Appeals.

lee's App. 1128-1129.[3] Petitioner was taken to the hospital. 4 Appellant's App. 534-35.

On September 18, 1996, Petitioner had to go to the hospital after hitting her hand against a wall in frustration and in a state of emotional distress. Appellee's App. 1130. She testified this was done out of anger and in a fit rage. *Id.*

On September 22, 1996 Petitioner was placed on a twenty-three hour emergency watch at Crestview due to suicidal thoughts and threats. Appellee's App. 1131.

On September 29, 1996, Petitioner once more had to go to the hospital after again hitting her hand against a wall in anger and rage. 4 Appellant's App. 1131.

The following day, Dr. Viray, Petitioner's psychiatrist, wrote a letter to then-Under-Sheriff Benton stating that Petitioner was unable to return to work and that her prognosis was poor. Dr. Viray specifically stated in that letter that Petitioner's return to her previous position may be hazardous to her and to the public and that further extensive evaluation is necessary. Appellee's App.1178. That letter was never withdrawn by Dr. Viray. Pet. App. 3a.

On October 1, 1996, Petitioner resigned from the Sheriff's Office, stating that she could not predict a return to work within a reasonable amount of time. 3 Appellant's App. 348.

On October 7, 1996 Petitioner was admitted to the emergency room following an apparent drug overdose. Appellee's App. 1141-49. The Police had found her locked in a bathroom; she was distraught, lethargic and barely conscious. The officer who brought her in testified that he considered Petitioner a threat and a danger to herself, and filled out paperwork to involuntarily commit her. 4 Appellant's App. 561-63 (testimony of Sgt. Walsh).

---

[3] Casper Mountain Road to Lookout Point is a winding narrow mountain road that Petitioner had obviously driven on while intoxicated.

On October 21, 1996, Petitioner was asked by her counselors and psychiatrist to release all weapons she had in her possession to her friends. That request was made out of concern for her safety and the safety of others. 2 Appellant's App. 229. She complied with that request.

On November 20, 1996, Dr. Viray wrote a letter to the Natrona County Sheriff's Department stating that Petitioner was ready to return to work. Pet. App. 3a; Appellee's App. 1155. At trial, however, Dr. Viray essentially repudiated that letter, stating that she could not say whether Petitioner was capable to returning to work as a patrol officer or whether plaintiff posed a direct threat, presently, or at the time she sought re-employment. Appellee's App. 1178; Pet. App. 3a-4a. Instead, Dr. Viray testified that Petitioner's PTSD does not have a linear progression, but rather is an episodic/crisis type condition, where there peaks and valleys and that there is simply no way to identify when plaintiff will crash again or what may trigger another relapse. 3 Appellant's App. 431-32; Pet. App. 4a. Petitioner's licensed counselor, Darlene Bayu, similarly testified that although 69% of people with post traumatic stress syndrome recover fully, the balance of 31% do not, and hence she could not say whether Petitioner was a threat to herself or to fellow officers. 3 Appellant's App. 395.

On January 28, 1997, Petitioner phoned the Casper Police Department to report that her friend Jay Black (a suspected drug dealer), was suicidal and may have been involved in an altercation at her apartment. Officers reporting to the scene stated that they were concerned for their own and for Petitioner's welfare because of Petitioner and her friend were acting unpredictably. 4 Appellant's App. 561-63.

On July 24, 1998, Petitioner wrote a letter to one of her doctors saying that she still needed counseling but just could not afford it; admitting that she still had ongoing problems. Appellee's App. 1150.

The numerous objective facts and opinions supporting the proposition that Petitioner would pose a direct threat if she returned to law enforcement were amply detailed at trial. Indeed, each of the investigating officers involved in the various events explained how Petitioner's conduct and acts caused concern and fear for their own safety and for the safety of members of the public. Pet. App. 6a.

Also presented at trial was substantial and undisputed evidence that law enforcement is an unforgiving business involving serious risks, dangerous instrumentalities, and lethal weapons. Officers are required to make split-second decisions in times of crisis, both within the jail and out on the street. 4 Appellant's App. 610; Pet. App. 15a-16a. In fact, two expert witnesses presented at trial – Tom Walton, a police expert, and Dr. Wihera a psychological expert specializing in police conduct – testified that it was reasonable for the Sheriff's Office to rely on the objective evidence of Petitioner's dangerous behavior to determine that she was no longer qualified to be a deputy sheriff. 5 Appellant's App. 791; Pet. App. 5a-6a. Tom Walton was even more critical, stating that the Sheriff would have been derelict in his duties had he hired Petitioner back as a deputy because she posed a direct threat to herself, fellow officers, and members of the community because of her prior actions. 5 Appellant's App. 791.

Relying on this extensive evidence, the jury found that Petitioner did indeed pose a direct threat to herself and others and consequently was not qualified for the job she sought. The trial evidence on this issue was overwhelming and there was essentially no evidence to the contrary.

ARGUMENT

Certiorari should be denied. First, because the overwhelming evidence presented at trial on the issue of direct threat would lead to the same outcome regardless of which party bore the burden of proof, this case is a poor vehicle in

which to consider the question presented. Instead, this Court should await a vehicle in which the burden of proof may have credibly played a material role in the outcome.

Second, Petitioner substantially overstates any split implicated by this case. Only four courts of appeals have squarely considered the narrow question presented here: Who bears the burden of proof of direct threat where safety considerations are inherently bound up in the essential functions of the job and hence effectively merge with the issue of whether plaintiff is a "qualified individual." Three courts, including the Tenth Circuit below, place the burden of proof on the plaintiff. Only one court – the Seventh Circuit – has held otherwise in similar circumstances, and it did so in a manner that suggests a failure to fully consider how the rule might apply differently in the context of inherently dangerous jobs. One additional court allocated the burden to the defendant in the context of a hazardous job, but did not address the distinction raised here and the burden of proof was irrelevant to the outcome in any event. The other two circuits cited as part of the split in fact have only ruled in the context of non-hazardous jobs, and even the Tenth Circuit below would place the burden on the defendant where danger is not an inherent element of the job. Given the undeveloped and in fact uncertain nature of the alleged split, further percolation is warranted.

Third, the Tenth Circuit's allocation of the burden of proof to the plaintiff in this narrow category of cases was eminently correct and entirely faithful to this Court's decisions. There simply is no need for this Court to intervene and review the correct rule applied and result reached below.

I. THIS CASE IS A POOR VEHICLE IN WHICH TO ADDRESS THE QUESTION PRESENTED.

Regardless whether in some cases the burden of proof of direct threat might play a role in the outcome, in this case it is all but irrelevant. The evidence presented at trial regarding

Petitioner's hazardous behavior and the ongoing risks posed by her episodic disorder that could result in violent, irrational, and destructive incidents, combined with the absence of any evidence that she could safely resume her law enforcement duties, made the jury verdict inevitable. The facts show repeated incidents of violence, intoxication, irrationality, and lapses of awareness and control. The psychiatric testimony suggested that her PTSD was episodic, could readily recur at unpredictable times, and was not cured in a very substantial percentage of cases. The expert testimony from an experienced police supervisor and an experienced police psychologist suggested that it was perfectly reasonable to take Petitioner's behavior into account in deciding not to rehire her into law enforcement and indeed that it might be utterly reckless to hire her given the objective facts.[4] Even Petitioner's own doctors and counselors were unable to vouch for her ability to perform her job safely. And her treating psychiatrist, Dr. Viray, repudiated at trial the one piece of evidence – the ready-to-return-to-work letter – that enabled Petitioner to avoid summary judgment.[5]

In light of such evidence, the jury correctly found that Petitioner posed a direct threat to the safety of herself and others

---

[4] There can be little doubt that if Petitioner had been rehired and then injured or killed somebody in a recurrence of her dangerous behavior, a lawsuit against the Sheriff's Office for gross negligence or recklessness would easily reach a jury based on the same evidence and testimony.

[5] The Tenth Circuit's initial reversal of summary judgment and finding of a genuine issue of fact regarding direct threat was based on a very different and leaner record. Pet. App. 24a-41a. In finding there to be a jury question on the issue the court observed that respondent did not full argue the appeal and that there was "no evidence suggesting in what way" Petitioner posed a threat given that she had been cleared by her doctor (referring to the return-to-work letter from Dr. Viray). Pet. App. 25a, 38a, 40a. But at trial Respondent presented voluminous evidence regarding the direct threat posed by Petitioner, and the key piece of evidence previously relied upon by the Tenth Circuit had been effectively repudiated by its author.

and thus was not qualified for a position with the Sheriff's Office. Indeed, no reasonable jury could have found otherwise under the applicable preponderance of the evidence standard. Given the substantial change in the record between the initial reversal of summary judgment and the jury verdict, Respondent would be entitled to summary judgment or judgment as a matter of law even under Petitioner's proposed shifting of the burden of proof.[6] Insofar as there may have been any error in the jury instruction, it was harmless error that did not affect the outcome of the case or the substantial rights of the parties, and did not undermine the substantial justice of the verdict. *See* FED. R. CIV. PRO. 61 (harmless error disregarded); *Cf. The Monrosa* v. *Carbon Black, Inc.*, 359 U.S. 180, 184 (1959) (Court decides issues "in the context of meaningful litigation. * * *. Resolution here of the * * * [issue in conflict among the circuits] can await a day when the issue is posed less abstractly.").

If this Court finds the question presented generally worthy of consideration at all, it would be better served by waiting for a case where the issue was meaningfully presented. If the issue is important and the purported split persists, there will be ample future vehicles in which a more balanced factual

---

[6] In fact, Respondent moved for a directed verdict at the close of Petitioner's evidence and again at the close of all the evidence. The district court took the motions under advisement and sent the case to the jury. The resulting verdict rendered those motions moot, but had the jury somehow come out the other way Respondent would have had an overwhelming case for a renewed motion for post-verdict judgment as a matter of law. FED. R. CIV. PRO. 50(b). Indeed, Respondent's entitlement to judgment as a matter of law – regardless of who bears the burden of proof –is an alternative ground for affirming the judgment below, and thus illustrates why this case is a poor vehicle. Should this Court ultimately agree, after full briefing, that the evidence of direct threat was so one-sided that the burden of proof does not matter, it might never reach the question presented and hence would have placed an unnecessary burden on its valuable time and resources. It would be far better to wait for a vehicle that does not pose such a risk of collapsing on its facts.

record will give appropriate context to, and elucidate the potential consequences of, the allocation of the burden of proof regarding direct threat.

II. THE ALLEGED SPLIT IN THIS CASE IS OVERSTATED.

Despite Petitioner's efforts to portray a deep split, there are actually only a few courts that have squarely addressed the narrow question presented here.

Three courts of appeals place the burden on the plaintiff to demonstrate that she is qualified for an inherently dangerous job by proving that she will not pose a direct threat to herself or others. The Tenth Circuit in the case below clearly articulated this rule and observed that while proof that a plaintiff is a direct threat would be an affirmative defense in cases where such threat is *not* bound up in the essential job functions at issue, where it is so bound up in the qualifications for the job in the first place, the burden remains on the plaintiff to prove that she is a qualified individual. Pet. App. 18a-20a.

The First Circuit has likewise held that where the issue of direct threat and a plaintiff's qualifications for an inherently dangerous job overlap, the burden remains on the plaintiff to prove that she is otherwise qualified in that she could safely perform the inherently dangerous essential functions of the job. *EEOC* v. *Amego, Inc.*, 110 F.3d 135, 144 (CA1 1997) (employee burden where essential job functions necessarily implicate safety). Both the First and Tenth Circuits limit their rule to the circumstances of essential job qualifications that inherently involve safety and in that narrow context apply the well-established rule that it is the employee's burden to prove that she is qualified for the job she seeks.

The Eleventh Circuit likewise places the burden of proof on the employee where the job in question involves inherent dangers and hence safety considerations are part of the qualifications for the job. *See Moses* v. *American Nonwovens, Inc.*, 97 F.3d 446, 447 (CA11 1996) (employee with epilepsy had burden of proving that he did not pose a direct threat

when working in precarious positions above, below, and next to extremely dangerous industrial machinery), *cert. denied*, 519 US 1118 (1997); *Waddell* v. *Valley Forge Dental Assocs.*, 276 F.3d 1275, 1280 (CA11 2001) (dental hygienist with HIV has burden of proving no direct threat where dental procedures involved inherent danger of blood exchange and open wounds), *cert. denied*, 535 U.S. 1096 (2002).[7]

Of the four circuits that Petitioner cites as placing the burden on the defendant to prove a direct threat, only one of those circuits has so held in the context of an inherently dangerous job and one other has done so where it had no bearing on the outcome and the inherent danger distinction at issue in this case was not squarely addressed. The other two circuits are not in conflict with the decision below at all.

The Second Circuit, for example, in *Hargrave* v. *Vermont*, 340 F.3d 27 (CA2 2003), addressed the issue in the quite different context of an ADA Title II claim involving the ability of a disabled person to enjoy the benefit of a durable power of attorney ("DPOA") for health care that specified a refusal to be involuntarily medicated. In that case the State never disputed the plaintiff's qualification to sign the DPOA when she was competent to do so, and the supposed danger posed by

---

[7] Petitioner's attempt, at 9, to impute a stricter rule to the Eleventh Circuit that would apply regardless of whether safety was an essential element of the job qualifications is mistaken. The Eleventh Circuit's observation in *Moses*, 97 F.3d at 447, that the employee retains "at all times the burden of persuading the jury" on the direct threat issue was plainly a reference to the burden of proof remaining constant *within* that given case, not an announcement of a broader rule of law applicable to cases where the absence of a direct threat was *not* part of the essential qualifications for a job that involved no inherent dangers. There is no indication that the Eleventh Circuit would apply the same rule where the job in question was secretarial or otherwise non-hazardous. In any event, even assuming, *arguendo*, a broader rule in the Eleventh Circuit that would apply to non-hazardous jobs, the validity of that rule is not even raised by the question presented in this case and hence such an alleged discrepancy among the courts offers no reason to take *this* case presenting a far narrower question.

not forcing medication on the plaintiff if she later became incapacitated was identical to the danger that would exist for non-disabled persons who later became incapacitated. *Id.* at 32, 35, 37. Given that DPOAs were enforceable for others notwithstanding the identical dangers – indeed, in spite of such dangers, for that is the very point of pre-determining a refusal of medication – it was obvious that the safety or lack thereof of such medical directives was not an essential element or requirement of the benefit and hence did not bear on the plaintiff's *qualifications* for the benefit. That case is more akin to employment cases where safety is *not* an essential job requirement and hence cannot properly be viewed as in conflict with the decision below.

The Second Circuit's decision in *Lovejoy-Wilson* v. *NOCO Motor Fuel, Inc.*, 263 F.3d 208, 220 (CA2 2001), likewise did not involve essential job requirements that inherently involved safety concerns. The job being sought in *Lovejoy-Wilson* was that of a convenience store manager and the disability in question was epilepsy. At no point was there any indication that the defendant claimed the job to be inherently dangerous or identified any essential elements of the job that plaintiff could not safely perform. Placing the burden on the defendant under those circumstances is understandable given that safety could not be said to be part of the job qualifications for such run-of-the-mill employment. Indeed, the Tenth Circuit's rule in the present case would lead to precisely the same result.[8]

The Fifth Circuit also does not disagree with the Tenth Circuit on the question presented, though it does add its own peculiar gloss that might eventually raise a conflict with some

---

[8] The Second Circuit also noted that there was a complete lack of evidence that the plaintiff in *Lovejoy-Wilson* posed any threat or risk at all and that there was considerable evidence that she could perform her job safely. 263 F.3d at 220-21. The burden of proof in that case thus was wholly irrelevant to the outcome.

other case. In *Rizzo* v. *Children's World Learning Centers, Inc.*, 173 F.3d 254 (CA5 1999) (*Rizzo II*), *aff'd*, 213 F.3d 209 (CA5) (*en banc*) (*Rizzo III*), *cert. denied*, 531 U.S. 958 (2000), the Fifth Circuit considered a claim by a hearing impaired plaintiff who was reassigned from her job as a driver of a van transporting young children. The court expressly agreed with the Eleventh Circuit's *Moses* holding "that the burden of proof is on the plaintiff to prove that, as a qualified individual, she is not a direct threat to herself or others." 173 F.3d at 259. On this point the Fifth Circuit likewise agrees with the Tenth Circuit below. The Fifth Circuit carved its own path, however, by shifting the burden of proof of direct threat back to the employer where the safety requirements "screen out or tend to screen out" the disabled. *Id.* at 259-60. While the court's reasoning on that point is somewhat suspect,[9] that additional gloss does not create a conflict with this case.

Petitioner here never challenged the safety requirement itself and never argued that it tended to screen out the disabled, hence that separate issue is not presented by the Petition. And while Petitioner now asserts that the Fifth Circuit's exception swallows the rule and effectively shifts the burden to defendants in *all* cases, Pet. 13-14 n. 6, that is merely the view of the *dissent* in *Rizzo II*, not the view of the Fifth Circuit. Because the putative safety standard in *Rizzo II* was narrowly defined as requiring the ability to discriminate spoken words, 173 F.3d at 259, and because plaintiff effectively refuted both the job-relatedness and business necessity of that narrow requirement through her years of safe driving, *id.* at 260, the

---

[9] To defend a qualification standard that screens out the disabled, a defendant need only prove that it is job-related, consistent with business necessity, and not cured by a proffered reasonable accommodation. 42 U.S.C. § 12113(a). A defendant does not have the further burden of proving that plaintiff substantively fails the otherwise valid qualification standard, *i.e.*, that she poses a direct threat. *See infra* Part III.

Fifth Circuit's limited exception was highly fact-bound to say the least, and its precedential effect far from certain.

The questionable value of *Rizzo II* as conflicting precedent is corroborated by the *en banc* decision in *Rizzo III*. There the court acknowledged its uncertainty on the legal issue presented here and saved the question for another day. 213 F.3d at 213 n. 4. Interestingly, the *en banc* court acknowledged the EEOC's evolved position regarding the burden of proving direct threat; a position that precisely matches the position of the Tenth Circuit in this case. *Id.* Whatever the quirks of *Rizzo II*, therefore, on the question presented in this case it is in agreement with the Tenth Circuit and *Rizzo III* amply demonstrates that the full Fifth Circuit is still keeping an open mind on the issue. Such a potentially evolving legal rule does not require this Court's premature intervention.

The Ninth Circuit has not *squarely* addressed the question presented in this case, though in one case it did allocate the burden of proof to defendant in connection with an inherently dangerous job. In its earliest case on the issue, there was no inherent danger involved. *Nunes* v. *Wal-Mart Stores, Inc.*, 164 F.3d 1243 (CA9 1999), involved the job of a cashier, and the employee suffered the disability of occasional fainting spells. There was no indication that the safety concerns were even remotely essential elements of such a standard job or that the job involved inherent risks of the sort present in the law enforcement or mass transit areas. Because the direct threat claim was not even remotely bound up in the essential functions of the job, it was not in that case tied to the plaintiff's ability to prove her qualification for the job. With the direct threat issue separated from the issue of qualification, the Ninth Circuit reached the same result that would be reached by the Tenth Circuit – it placed the burden of proof on the defendant.

An inherently dangerous job was at issue, however, in *Hutton* v. *Elf Atochem N. America, Inc.*, 273 F.3d 884 (CA9

2001). That case involved a chemical plant employee with diabetes that caused him to have blackouts and disorientation while on the job. In *Hutton*, however, the Court did not consider the discrete argument that the burden of proof is different for inherently dangerous jobs than it is for generally safe jobs, but rather simply relied on its decision in *Nunes* without addressing the distinction drawn by the Tenth Circuit below. *Id.* at 893. How the court would resolve that issue if squarely presented is unknown. Furthermore, in *Hutton* the burden of proof was completely irrelevant to the disposition given that the court affirmed summary judgment for *defendant* despite its allocation of the burden of proof. *Id.* at 895. Insofar as it addresses the question in this case *sub silencio* merely due to its factual context, that implied legal determination would be *dicta* and not binding on a subsequent panel of the Ninth Circuit. Such *dicta* is a thin predicate for a split.

The one court to reach a meaningful contrary conclusion on the narrow question presented here is the Seventh Circuit. In *Branham* v. *Snow*, 392 F.3d 896 (CA7 2004), the court addressed whether a diabetic IRS agent seeking to become a criminal investigator had raised a genuine issue of fact regarding whether he would pose a direct threat in such a job. While the court did state that the burden was on the IRS to demonstrate that the plaintiff would pose a direct threat, *id.* at 906-07, there are good reasons to discount the significance of that holding. For example, in discussing the evidence in the case the Seventh Circuit found that the plaintiff had proffered evidence, including medical opinion, that he could safely perform his duties and that defendant had not established otherwise. *Id.* at 905, 908-09. It thus reversed summary judgment for the defendant. In the face of direct evidence presented by the plaintiff on the direct threat issue, the allocation of the burden of proof had no impact on finding a genuine issue of material fact that precluded summary judgment.

Furthermore, the court's decision did not seem carefully to consider the distinct treatment of cases where direct threat

was part of the qualification rather than a defense unrelated to qualification. 392 F.3d at 906-07. Indeed, in describing the supposed dispute among the circuits, the Seventh Circuit conflated the separate issues of threats in the context of jobs with inherent safety components and jobs where the alleged safety concern is wholly incidental to the essential elements of the job. *Id.* at 906 n. 5 (mixing cases involving ordinary and hazardous jobs). That muddling of the issues further manifested itself in the court's refusal to revisit what it deemed established law of the circuit regarding the burden of proof. *Id.* Unfortunately that law was established in a different context not involving inherently dangerous jobs and hence did not really go to the distinction drawn by the Tenth Circuit.[10] How the Seventh Circuit would rule in a case where the distinction is clearly presented and considered is anybody's guess. While *Branham* thus may create a seeming split, it hardly represents a *settled* split.

Overall, the conflict alleged by Petitioner is at a minimum exaggerated and may well be illusory. Both the Seventh and Ninth Circuits seem to have overlooked the distinct issues raised by inherently dangerous jobs and simply applied existing precedent from cases that did not involve inherent dangers. Whether the Seventh or Ninth Circuits would maintain their positions in a case where the narrower question presented here was squarely litigated is unknown, and the apparent conflict could well resolve itself in future cases. Additional percolation of this issue thus could eliminate any seeming split or, at a minimum, could provide this Court additional and valuable analysis of the narrow question presented.

---

[10] *Dadian* v. *Village of Wilmette*, 269 F.3d 831, 835, 841 (CA7 2001) (case involving housing discrimination based on denial of permission to make a curb-cut for a more handicapped-accessible driveway for plaintiff's home; fact that local ordinance allowed curb cuts where 50% of the houses on a block had such curb cuts shows that safety concerns were not an essential qualification for permission to make a cut where fewer than 50% of houses had such cuts).

III. THE DECISION BELOW IS ABSOLUTELY FAITHFUL TO THE ADA AND THIS COURT'S DECISIONS.

The decision below correctly recognized – and Petitioner stipulated – that law enforcement is an inherently hazardous occupation, posing dangers to the employee, her coworkers, and the public. And there is no dispute in this case that the ability to engage in law enforcement activities (including possession and handling of a firearm) safely and responsibly is an essential job qualification for a position with the Sheriff's Office. On its face it seems apparent that Petitioner cannot prove she is a qualified individual without proving her ability to perform her desired job safely and responsibly. *See Arline*, 480 U.S. at 287 n. 16 (person posing a health risk to coworkers not "otherwise qualified" for her job as required under Rehabilitation Act).

Petitioner's confusion on the burden of proof question, however, stems from the reference to the permissibility of a no-direct-threat qualification standard in a section relating to a *defense* to certain claims of discrimination. 42 U.S.C. § 12113. But when that section is read in its entirety and in the context of the specific type of discrimination to which it relates, it becomes plain that the "defense" at issue relates to the *validity* of any qualification standard, including one relating to direct threats, and does not suggest that the individual *satisfaction*, or lack thereof, of a valid qualification standard is likewise a defense rather than part of a plaintiff's *prima facie* burden of showing she is a qualified individual.

Discrimination under the ADA can be asserted in a variety of forms. The most obvious form is the simple refusal to hire a qualified individual based on her disability. 12 U.S.C. § 12112(a). But jobs of all sorts have various qualification standards through which they set out the essential elements of those jobs and the skills and abilities required for those jobs. Such qualification standards may require the ability to drive a truck (for a truck driver position), the ability to carry a fire-

hose while in full gear (for a fire-fighter position), the ability to speak a foreign language (for an interpreter position), or the ability to perform a hazardous activity safely and responsibly (for a police officer, an airline pilot, or a surgeon, for example). Whatever the qualification standard, if a disabled job applicant is unable to meet such standards, and hence unable to show that she is a qualified individual, she may still allege discrimination in the very existence of the standard itself. The ADA categorizes as a discrete form of discrimination

> using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity * * *.

42 U.S.C. § 12112(b)(6). Thus, if a qualification standard tends to screen out the disabled it may constitute discrimination in and of itself and hence potentially would be an invalid measure of whether an individual is qualified for a particular job. But this category of "discrimination" contains a built-in exception: Even a standard that tends to screen out the disabled will not be considered discriminatory, and hence will remain a valid measure of an individual's qualification for a job, if the standard "is shown to be job-related for the position in question and is consistent with business necessity."

It is to this discrete category of discrimination that the "defense" provision of § 12113(a) & (b) apply. Indeed, § 12113(a) basically restates the built in exception for job-related standards consistent with business necessity:

> It may be a defense to a charge of discrimination under this chapter that an alleged *application of qualification standards*, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to

> an individual with a disability *has been shown to be job-related and consistent with business necessity*, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(Emphasis added.) The subsequent reference to a "direct threat" in § 12113(b) merely confirms that it is generally permissible to include safety requirements as part of qualification standards: "The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." That subsection does not create a separate defense for direct threats, but merely relates back to the job-relation/business-necessity defense for qualification standards in general. The only things a defendant may be required to prove as a defense are job relation, business necessity, and the potential negation of a proffered reasonable accommodation in lieu of the standard. (And even then such a defense is only necessary if the plaintiff demonstrates that the qualification standard tends to screen out the disabled.) Once the standard itself is successfully defended against a claim of discrimination, it simply becomes a valid measure of the necessary qualifications for a particular job, and hence part of the plaintiff's burden of proving that she is a qualified individual.

Where Petitioner goes awry in claiming that proof of a direct threat itself is an affirmative defense is in conflating the *validity* of the standard with its *satisfaction*. Nothing in § 12113 makes the satisfaction of a qualification standard an affirmative defense. To do so would completely invert the burden of proof on the plaintiff's *prima facie* case. Truck driver applicants would not have to prove that they are qualified to drive, fire-fighter applicants would not have to prove they are qualified to fight fires, and law enforcement applicants would not have to prove that they are capable of safely and responsibly being entrusted with weapons and the authority to use deadly force. Under such an erroneous interpreta-

tion a plaintiff's well-established obligation to prove that she is a qualified individual would become meaningless.

The necessary distinction between the validity and the satisfaction of qualification standards amply confirms the correctness of the decision below. There is no dispute that law enforcement is a hazardous occupation and that a qualification standard requiring the absence of a direct threat when performing law enforcement activities is both job-related and required by business necessity. Indeed, Petitioner does not suggest otherwise.[11] Likewise, there is no issue on appeal regarding any supposed reasonable accommodations that could supplant the basic safety and responsibility standard.

It is unsurprising that such issues are not in dispute; how could they be. Law enforcement officers are given extensive powers, including the power to use deadly force in many situations. With that power comes the responsibility to exercise it in a safe and responsible manner. Such safe and responsible conduct is at the very heart of the trust given to such officers and is critically necessary to the job of law enforcement personnel. It is, in short, an "essential function" of the job of a law enforcement officer. The direct-threat job qualification in this case thus does not constitute discrimination and is a valid measure of whether Petitioner is a qualified individual.

The only question that remains, therefore, is whether the Petitioner *satisfied* the direct-threat job qualification. That question is an essential element of Petitioner's case and hence was properly her burden to prove, as the Tenth Circuit correctly held.

Properly read, there is no tension whatsoever between the "defense" provisions of the ADA and the requirement that

---

[11] Petitioner did not even argue that the standard itself was discriminatory in that it tends to screen out the disable, and hence the validity of the standard is not in question and a "defense" of the standard is not required.

plaintiffs demonstrate their satisfaction of valid qualification standards in order to prove they are qualified individuals. And for inherently dangerous jobs, it is a valid qualification standard to require that applicants not pose a direct threat to themselves or others in performing those jobs. Indeed, that is precisely the position taken by the EEOC and expressed to the *en banc* Fifth Circuit in *Rizzo III*. *See* 213 F.3d at 213 n. 4 ("The EEOC suggested at argument that where the essential job duties necessarily implicate the safety of others, the burden may be on the plaintiff to show that she can perform those functions without endangering others; but, where the alleged threat is not so closely tied to the employee's core job duties, the employer may bear the burden.").

The Tenth Circuit got it right, the legal issue is straightforward once properly articulated, and other circuits can be expected to reach the same result when the issue is squarely and effectively presented to them. There is simply no reason for this Court to expend its own resources addressing the question presented in this case.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Peter Young
SCHWARTZ, BON, WALKER
& STUDER, LLC
141 South Center
Casper, WY 82601
(307) 235-6681

Erik S. Jaffe
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th St., N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Respondent

Dated: April 22, 2005

3

Supreme Court, U.S.
FILED
MAY 2 - 2005
OFFICE OF THE CLERK

No. 04-1057

IN THE

Supreme Court of the United States

LORRAINE "JADE" MCKENZIE,

Petitioner,

v.

MARK BENTON, IN HIS OFFICIAL CAPACITY AS SHERIFF OF NATRONA COUNTY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Bernard Q. Phelan
PHELAN-WATSON
LAW OFFICES
2206 Pioneer Avenue
Cheyenne, WY 82001
(307) 634-8085

Robert A. Long
Counsel of Record
Theodore P. Metzler
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Petitioners

May 2, 2005

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. The Split On The Question Presented Is Both Wide And Deep. 1

II. This Case Is An Appropriate Vehicle To Resolve The Conflict. 4

III. Respondent's Argument On The Merits Affords No Basis For Denying Review. 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Page(s)

Branham v. *Snow*,
392 F.3d 896 (7th Cir. 2004) 1, 2, 3
EEOC v. *Amego, Inc.*,
110 F.3d 135 (1st Cir. 1997) 2, 4
Hutton v. *Elf Atochem N. Am., Inc.*,
273 F.3d 884 (9th Cir. 2001) 1, 2, 3
Johnson v. *California*,
125 S. Ct. 1141 (2005) 8
LaChance v. *Duffy's Draft House, Inc.*,
146 F.3d 832 (11th Cir. 1998) 2
Lovejoy-Wilson v. *NOCO Motor Fuel, Inc.*,
263 F.3d 208 (2d Cir. 2001) 3
Lowe v. *Ala. Power Co.*,
244 F.3d 1305 (11th Cir. 2001) 2
McKenzie v. *Benton*,
388 F.3d 1342 (10th Cir. 2004); Pet. App. 1a ..... *Passim*
Moses v. *American Nonwovens, Inc.*,
97 F.3d 446 (11th Cir. 1996) 2
Rizzo v. *Children's World Learning Centers, Inc.*,
173 F.3d 254 (5th Cir. 1999) ("*Rizzo II*") 2, 3
Rizzo v. *Children's World Learning Centers, Inc.*,
213 F.3d 209 (5th Cir. 2000) ("*Rizzo III*") 1, 2
School Bd. of Nassau County v. *Arline*,
480 U.S. 273 (1987) 6

STATUTES

42 U.S.C. § 12101 6
42 U.S.C. § 12113 8

REGULATIONS

29 C.F.R. §1630.2(r) 5, 9
29 C.F.R. 1630 App..... 9

REPLY BRIEF FOR PETITIONER

Respondent acknowledges the existence of a circuit conflict on the allocation of the burden of proof of "direct threat" in an employment discrimination case under the Americans with Disabilities Act ("ADA"). *See* Br. in Opp. 11-12. Four courts of appeals, including the court of appeals in this case, have likewise recognized the existence of a split. *See* Pet. App. 18a; *Branham* v. *Snow*, 392 F.3d 896, 906 n.5 (7th Cir. 2005); *Hutton* v. *Elf Atochem N. Am., Inc.*, 273 F.3d 884, 893 n.5 (9th Cir. 2001); *Rizzo* v. *Children's World Learning Centers, Inc.*, 213 F.3d 209, 212-13 & nn.2-3 (5th Cir. 2000) ("*Rizzo III*"). Respondent attempts to minimize the depth and breadth of the split, and asserts that the allocation of the burden of proof makes no difference in this case, but he is wrong on both counts. In short, this case presents an important question on which the circuits are divided, and there is no reason to delay resolution of the circuit split. Accordingly, the petition should be granted.

I. The Split On The Question Presented Is Both Wide And Deep.

Respondent tries to narrow the scope of the issue in this case to the allocation of the burden of proof of "direct threat" in cases in which the job or jobs at issue "involve inherent danger." *See* Br. in Opp. i, 11-17. Respondent's re-writing of the question presented is not justified, but in any event it does Respondent no good. Even if one considers only "inherently dangerous" jobs, there is a 4-to-2-to-1 circuit conflict on the proper allocation of the burden of proof of "direct threat."

Respondent's effort to rewrite the question presented is unjustified. It is true that two circuits (the First and Tenth) consider whether a job is inherently dangerous or involves essential functions that raise safety concerns. As the petition in this case explained, the First Circuit articulated this

position in 1997 in *EEOC* v. *Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997). *See* Pet. App. 9-11.

Most circuits, however, do not consider these factors. This is not because these circuits were unaware of *Amego*. Each of the four courts of appeals that allocates the burden of proof of the direct threat defense to the defendant decided or reaffirmed that allocation *after* the *Amego* decision. Indeed, three of these circuits specifically cited *Amego* and declined to follow it. *See Branham*, 392 F.3d at 906 n.5; *Hutton*, 273 F.3d at 893 n.5; *Rizzo III*, 213 F.3d at 212-13 & nn.2-3. Respondent's suggestion (Br. in Opp. 17) that these circuits will overturn their precedents is thus without merit.[1]

Moreover, Respondent's attempted rewriting of the question presented does not cause the circuit split to dissolve. Decisions of four other circuits conflict with the holding below, whether or not one views the split through Respondent's "inherently dangerous" formulation of the question presented.

Respondent correctly recognizes that the ruling below conflicts with the Seventh Circuit. *See* Br. in Opp. 16

---

[1] Respondent's assertion (Br. in Opp. 11-12) that the Eleventh Circuit's decision in *Moses* v. *American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996), is limited to inherently dangerous jobs is contrary to the views expressed by the Eleventh Circuit and other courts that have considered the decision. The Eleventh Circuit stated, "The employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available." *Moses*, 97 F.3d at 447. The Eleventh Circuit has repeatedly used the "at all times" language to describe its allocation of the burden of proof to plaintiff. *E.g.*, *Lowe* v. *Ala. Power Co.*, 244 F.3d 1305, 1306 (11th Cir. 2001); *LaChance* v. *Duffy's Draft House, Inc.*, 146 F.3d 832, 836 (11th Cir. 1998). No other court has suggested that the language in *Moses* allows for any exceptions. *See, e.g.*, Pet. App. 18a; *Hutton*, 273 F.3d at 893 n.5; *Rizzo II*, 173 F.3d at 259 ("[T]hat opinion allows for no exceptions to this rule.").

(Seventh Circuit reached "a meaningful contrary conclusion" on the question presented in *Branham* v. *Snow*, 392 F.3d 896 (7th Cir. 2004)). Respondent also recognizes that the Ninth Circuit "allocate[d] the burden of proof to defendant in connection with an inherently dangerous job" in *Hutton* v. *Elf Atochem N. Am., Inc.*, 273 F.3d 884 (9th Cir. 2001). Br. in Opp. 15. There is no basis for Respondent's suggestion (Br. in Opp. 16) that the *Hutton* court did not address the issue "squarely." The court's opinion specifically mentioned the evolving circuit split. 273 F.3d at 893 n.5. In addition, the court described (but did not follow) the First Circuit's decision in *Amego* that plaintiff bears the burden to prove she can safely perform a job's essential functions. *Id.* Thus, even under Respondent's erroneous view of the question presented, the Seventh and Ninth Circuits are squarely in conflict with the Tenth.

Further, respondent's question presented would not alter the conflict between the ruling below and the Second and Fifth Circuits. Respondent's contention that *Lovejoy-Wilson* v. *NOCO Motor Fuel, Inc.*, 263 F.23d 208 (2d Cir. 2001), "did not involve essential job requirements that inherently involved safety concerns," Br. in Opp. 13, is simply wrong. The *Lovejoy-Wilson* plaintiff was unable to drive because of epilepsy. 263 F.2d at 213. She sought a promotion to gas station manager, but was turned down because she could not perform the required task of driving to the bank to make deposits. *Id.* Nevertheless, the Second Circuit, ruling four years after *Amego*, did not place the burden on plaintiff to prove she was not a direct threat.

Respondent also argues that the Fifth Circuit "does not disagree with the Tenth Circuit." Br. in Opp. 14. But as Respondent correctly acknowledges, the Fifth Circuit "shift[s] the burden of proof of direct threat back to the employer where the safety requirements 'screen out or tend to screen out the disabled.'" *Id.* (quoting *Rizzo II*, 173 F.3d at 259-60). Respondent argues that this standard does not

conflict with the Tenth Circuit because McKenzie "never challenged the safety requirement itself and never argued that it tended to screen out the disabled." Br. in Opp. 14. But Respondent never articulated any safety requirement that McKenzie could not satisfy. In fact, Sheriff Dovala admitted that he based his decision on his knowledge of McKenzie's history of mental problems. Pet. App. 4a-5a, 30a-31a. To the extent that Respondent asserts a "safety requirement" that applicants lack a history of mental illness, the requirement by definition screens out the disabled. Had this case been decided in the Fifth Circuit, the burden of proving direct threat would have been allocated to the defense.

Finally, as noted *supra*, note 1, the ruling below conflicts with the Eleventh Circuit, which places the burden of proving direct threat "at all times" on plaintiff. The Eleventh is thus yet another circuit in conflict with the Tenth Circuit below.

Respondent's articulation of question presented does not alter the various positions of the circuits. The parties agree that the burden of proof in the First and Tenth Circuits depends on the nature of the job involved. *Amego*, 110 F.3d 135; Pet. App. 20a. This view conflicts with all of the other courts of appeals to have considered the question. The circuit split is well-defined and can only be resolved in this Court.

II. This Case Is An Appropriate Vehicle To Resolve The Conflict.

Respondent contends that this case would have come out the same way regardless of the district court's allocation of the burden of proof. Br. in Opp. 8-11. The court of appeals did not agree. In fact, the assignment of the burden of proof of "direct threat" was the dispositive issue in this case.

The burden of proof of direct threat was the pivotal issue at trial and on appeal. The parties briefed the issue before trial, and argued it in the jury instruction conference. R. 1:31-

32, 5:811-14.[2] The jury found all the facts necessary for McKenzie to prevail except for the "direct threat" issue. The jury found that McKenzie was disabled under the ADA, that she was otherwise qualified for the position she sought, and that Respondent discriminated against her because of her disability. Pet. App. 6a. It also found that McKenzie posed a "direct threat"; this finding determined the outcome. *Id.* The court of appeals extensively discussed the assignment of the burden of proof, but did not hold or suggest that the resolution of that issue makes no difference in this case. Pet. App. 16a-22a.

The ADA's regulations require that an employer make an individual determination of "direct threat."

> The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's *present ability* to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

29 C.F.R. 1630.2(r) (emphasis added). It is undisputed that Respondent did not perform any such assessment in this case. Pet. App. 5a. Although McKenzie was willing to take a psychological examination, Respondent would not allow it. Pet. App. 26a. As Respondent testified, McKenzie "didn't make it to that step." Pet. App. 31a.

---

[2] "R. _:__" refers to the trial transcript by volume and page number. "Resp. C.A. App." refers to Respondent's Appendix in the Court of Appeals.

Instead of performing the individualized assessment the ADA requires, the sheriff relied on his own knowledge of McKenzie's mental health history. Pet. App. 5a, 30a-31a. Respondent's brief recites the incidents caused by McKenzie's post-traumatic stress disorder ("PTSD"), but these incidents do not prove she was a direct threat at the time she sought reemployment.[3] In fact, these incidents occurred during a relatively brief time in 1996, when McKenzie was trying to come to terms with the fact that her father raped her in her childhood.[4] Respondent nevertheless argues that these incidents prove McKenzie was a direct threat. Br. in Opp. 7. To the contrary, relying on past mental illness to determine a present "direct threat" is an assumption "based on prejudice, stereotypes, or unfounded fear," contrary to the purpose of the ADA. *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 287 (1987) (Rehabilitation Act case); *see* 42 U.S.C. § 12101. The allocation of the burden of proof in this case allowed the jury to similarly rest its verdict on fear and stereotype.

---

[3] Respondent significantly overstates the incidents of McKenzie's mental illness. For example, it is not true that McKenzie "was found . . . firing her service revolver into the grave of her dead father and having overdosed on prescription medications." Br. in Opp. 4. McKenzie was alone at the cemetery when she fired her personal weapon. McKenzie herself called her former sergeant, who called other officers to respond to the cemetery. R. 2:145-47. There was no testimony that she had "overdosed," and the officers dispatched to the cemetery never "describe[d] Petitioner as intoxicated and irrational," nor did they testify that they "believed she was a danger both to herself and the public." Br. in Opp. 4; *see* R. 4:514-18 (Officer Hadlock); R. 4:546-52 (Officer Rostad). Further, McKenzie was not released from the hospital "on condition" of outpatient therapy and supervision. Br. in Opp. 4. Instead, McKenzie was discharged "with a recommendation to attend Partial Programming" and continue therapy. Resp. C.A. App. 1106.

[4] Respondent describes one incident on January 28, 1997, but the testimony he cites refers to events on October 7, 1996. Br. in Opp. 6.

Moreover, Dr. Viray wrote on November 20, 1996, "As [McKenzie's] treating physician, I definitely agree that she is ready to return to work." Resp. C.A. App. 1155. Far from repudiating this letter at trial, Dr. Viray specifically reaffirmed it. She testified, "As of November 20th, 1996, I believe that Lorraine is free of symptoms of her illness with the use of medication, and with that I believe that she is able to return to her premorbid functioning." R. 2:207. Dr. Viray further testified, "'Premorbid' means before she got ill, and the best thing I could evaluate a person is that they're free of their illness, and so that means that they are able to function back to their useful activities." *Id.*[5]

McKenzie's counselor, Darlene Bayuk similarly testified that McKenzie was able "to work in any position for which she is technically qualified." R. 3:390. Bayuk stated that her determination was based on McKenzie's "ego functioning," her ability to think logically, her "planning and organizational skills," her "abilities to cope with stress," her ability to "assess the situation and reasonably predict consequences," and her ability to monitor "what's going on with her and relate that to external reality or stimulus and behave appropriately." *Id.* at 390-91. Bayuk testified that McKenzie is "above average in all of these areas of functioning." *Id.* at 391.[6] Had the burden of proof properly

---

[5] The record does not support Respondent's assertions that Dr. Viray repudiated her letter. Br. in Opp. 6, 9. Dr. Viray did testify on cross examination that there is no way to guarantee that symptoms of PTSD will not recur. R. 3:432. But that line questioning itself shows plaintiff should not be required to prove absence of "direct threat." Under Respondent's theory, anyone with a history of PTSD would be permanently disqualified from any "inherently dangerous" job.

[6] Although Respondent argues McKenzie did not present evidence that she could safely perform her job, in fact she presented evidence of her ten years of service with an unblemished record. Respondent never argued that McKenzie engaged in inappropriate conduct while on the job.

been placed on defendant, Petitioner would have prevailed. The error here was far from harmless.[7]

III. Respondent's Argument On The Merits Affords No Basis For Denying Review.

Respondent's interpretation of the "direct threat" defense finds no support in the ADA or its implementing regulations. Respondent contends that the "direct threat" defense relates only to the "validity" of a no "direct threat" qualification standard, rather than to the application of such a standard to a particular plaintiff. Br. in Opp 20. This interpretation contradicts the plain language of act. Section 12113(a) states:

> It may be a defense to a charge of discrimination under this Act that an alleged *application* of qualification standards, tests or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this title.

(emphasis added). Assuming Respondent is correct that the relevant "qualification standards" in this case include a requirement that Petitioner not pose a direct threat to health or safety, Petitioner clearly advanced a "charge of discrimination under [the ADA]" that the "application" of

---

[7] There is no basis for Respondent's suggestion that the Court may be unable to decide the burden of proof question in this case. Br. in Opp. 10 n.6. If the Court decides the burden of proof question, it has discretion to remand the case to the courts below to apply the proper legal standard to the facts of this case. *E.g.*, *Johnson* v. *California*, 125 S. Ct. 1141, 1148 (2005).

that standard denied "a job or benefit to an individual with a disability," namely the Petitioner. To avail himself of the defense, Respondent must show that the *application* of the standard to McKenzie was job-related and consistent with business necessity, and that reasonable accommodation was not feasible. It is the "application" of the standard—not the standard itself—that must be shown to be job-related and consistent with business necessity.

The EEOC's regulations and interpretive guidance confirm this reading. The regulations require that the employer perform a specific individualized assessment of an individual's present ability to safely perform the essential functions of the job. 29 C.F.R. § 1630(r). "For individuals with mental or emotional disabilities, the employer must identify the specific behavior on the part of the individual that would pose the direct threat." 29 C.F.R. § 1630 App. The employer must then consider the duration of the risk, the nature and severity of the potential harm, the likelihood of the harm occurring, and the imminence of the potential harm. *Id.* This evaluation must be done by the employer, well before the plaintiff commences a lawsuit or asserts a particular type of ADA claim.

In short, Respondent is wrong to assert that § 12113 comes into play only when a plaintiff contends that a qualification standard is generally invalid in all its applications. As with other affirmative defenses, the burden of proofing the defense that an ADA plaintiff posed a "direct threat" to the health or safety of other individuals is properly placed on the defendant. Pet. App. 17-20.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Bernard Q. Phelan
PHELAN-WATSON
LAW OFFICES
2206 Pioneer Avenue
Cheyenne, WY 82001
(307) 634-8085

Robert A. Long
Counsel of Record
Theodore P. Metzler
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Petitioners